No. ___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DILLARD'S, INC.,

Petitioner,

v.

GERDA BYRD, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Which of the differing versions of the equitable tolling doctrine applied by the circuit courts of appeals to the limitations period for filing of a charge of discrimination under the federal Age Discrimination in Employment Act (ADEA) with the Equal Employment Opportunity Commission (EEOC) is the correct interpretation of the doctrine?

2. Whether the limitations period for filing a charge of discrimination under the ADEA is tolled as a matter of law until an aggrieved employee who believes discrimination has occurred gathers enough evidence to prove a prima facie case and to make an argument that the employer's stated reason is pretextual?

3. Whether the Eleventh Circuit's decision is in conflict with those circuits that hold that equitable tolling cannot be used to delay running of the limitations period until evidence develops to fit plaintiff's preferred method of proof?

4. Whether the Eleventh Circuit correctly decided that the limitations period for filing a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) under the ADEA is tolled as a matter of law until the aggrieved employee learns of the hiring of a substantially younger replacement?

5. Whether the Eleventh Circuit's interpretation of the equitable tolling doctrine conflicts with the standard announced by other circuits that equitable tolling does not bring about an automatic extension of the statute of limitations by the length of the tolling period or any other definite term?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Dillard's, Inc., a Delaware corporation. No publicly held company owns ten percent or more of the Petitioner.

Respondent is Gerda Byrd, an individual.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Dillard's, Inc., respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit ("the Eleventh Circuit").

OPINION BELOW

The initial opinion of the Eleventh Circuit, issued on April 28, 2004, is reported at 331 F.3d 1259 (11th Cir. 2003) and reproduced in Petitioner's Appendix (hereinafter "App.") at 1a-20a. The initial order denying rehearing *en banc* is reported at 2003 U.S. App. LEXIS 25458 (11th Cir. August 11, 2003) and is reproduced in App. at 31a-32a. As part of its initial opinion, the Eleventh Circuit certified a question to the Alabama Supreme Court regarding the statute of limitations applicable to claims under the Alabama Age Discrim-

ination in Employment Act. The Alabama Supreme Court answered that question by opinion dated April 2, 2004. After receiving the Alabama Supreme Court's answer, the Eleventh Circuit issued a second opinion dated April 28, 2004, which is reported at 368 F.3d 1278 (11th Cir. 2004) and is reproduced in App. at 21a-30a. The order denying Dillard's second petition for rehearing *en banc* was filed June 25, 2004 and is reproduced in App. at 33a-34a.

JURISDICTION

Judgment of the Eleventh Circuit was entered on April 28, 2004, and the order denying panel rehearing and denying rehearing *en banc* issued on June 25, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

29 U.S.C. § 626(d) provides, in pertinent part:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred;

STATEMENT OF THE CASE

The Proceedings Below

Plaintiff, Gerda Byrd, asserted claims in the district court for age discrimination under the Age Discrimination in Employment Act ("ADEA") and the Alabama Age Discrimination in Employment Act ("AADEA"), and a state law fraud claim. The district court had federal question subject matter jusridiction, pursuant to 28 U.S.C. § 1331 and § 1343(a)(3), and supplemental jurisdiction over the plaintiff's pendant state law claims pursuant to 28 U.S.C. § 1367(a). The district court granted summary judgment on

all claims asserted by Byrd and the other five plaintiffs. The district court found that Byrd's age discrimination claims were time-barred because she did not file her EEOC charge within the required 180-day period.[1] By opinion entered May 30, 2003, a panel of the Eleventh Circuit affirmed the dismissal of plaintiff's fraud claim, reversed the dismissal of the federal ADEA claim, and sent a certified question to the Alabama Supreme Court regarding the statute of limitations for the Alabama Age Discrimination in Employment Act. Once the Alabama Supreme Court answered the certified question, the Eleventh Circuit issued a decision again affirming the dismissal of plaintiff's fraud claim, but reversing the dismissal of the federal and state age claims and holding that both claims were saved by the doctrine of equitable tolling. Dillard's requested re-hearing *en banc* of both Eleventh Circuit Orders, and both requests were denied. The Eleventh Circuit entered its judgment on April 28, 2004. Dillard's last petition for rehearing was denied on June 25, 2004.

Statement of the Facts

Plaintiff, Gerda Byrd claims that Dillard's violated the Age Discrimination in Employment Act and the Alabama Age Discrimination in Employment Act when it eliminated her Assistant Area Sales Manager ("AASM") position.[2] In late April or early May 1999, Store Manager Scott Gallant told Byrd that her AASM position in the Tuscaloosa Dillard's was being eliminated due to poor store sales, and Byrd was offered a sales position at the cosmetics counter. Byrd refused to work at the cosmetics counter and asked Store Manager Gallant and District Manager Gary Wirth for a severance package in late April/early May 1999. On Friday, May 21, 1999, Byrd was informed that she was approved for severance, and her last day of employment with Dillard's was May 22, 1999.

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[1] Alabama is a non-deferral state.

[2] Byrd has since elected to pursue only the Federal ADEA claim.

Byrd suspected the elimination of her position was motivated by "age discrimination" and was aware of her rights under the ADEA no later than June 12, 1999. While she was still working at Dillard's, Byrd and co-workers discussed that older workers were treated less favorably than younger workers. She testified in her deposition: "[a] lot of old people were severanced, older people, and we were talking about it . . . we said it looks like all the older ones are getting the shaft in here."

Byrd testified that Assistant Store Manager Andy Poole told her on June 8, 1999, that Store Manager Gallant had instructed him to look for two candidates for AASM positions. This conversation allegedly took place only two weeks after Byrd left her position having been told that the store's sales would not support her AASM position. Byrd's personal notes, dated June 12, 1999, show her awareness of her possible claim:

> On Tuesday 6-8-99 Mr. Andy Poole told me at Chillys [sic] Restaurant that Mr. Gallant told him, they had to find two new AASM's.
>
> This happens after I was told, the store could not afford any AASM's, because they were not making their figures.
>
> **Seems to me, I was lied to!!! As soon as I find out there are two new AASM' in place I will file a lawsuit against Dillards. This lawsuit will be for Age Discrimination, and Wage discrimination.**

(emphasis added). Byrd alleges that she learned on November 1, 1999, that a twenty-eight year old female, Tiffany Winters, had been hired to fill Byrd's former AASM position.

Byrd filed her EEOC Charge alleging violation of the ADEA on February 24, 2000. Her charge was filed more than nine months after the elimination of her position in late April/early May 1999; more than eight months after her June

12, 1999, written statement of her intent to file a "lawsuit . . . for Age Discrimination;" and almost four months after Byrd learned of her replacement's hiring.

The Eleventh Circuit's Decision

The Eleventh Circuit reversed the district court's holding that Byrd's claims were time-barred. The court concluded that the limitations period should be equitably tolled until plaintiff gathered enough evidence to establish her preferred prima facie case and to allegedly prove that the employer's proffered reason for elimination of her position was pretextual. *Jones et al. v. Dillard's, Inc.*, 331 F.3d 1254, 1265-66 (11th Cir. 2003). The Eleventh Circuit panel concluded that Byrd did not have enough evidence to begin the running of the statute of limitations until Byrd learned on November 1, 1999, that a younger employee had replaced her. *Id.*, at 1267-68. The Eleventh Circuit allowed Byrd a full 180 days from the November 1 discovery and, therefore, held that her filing in February of 2000, four months after the discovery of her replacement, was timely.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO THE APPROPRIATE STANDARD FOR EQUITABLE TOLLING.

This Court has previously determined that the limitations period for discrimination claims begins to accrue when plaintiff is informed of the adverse employment action. *Delaware State College v. Ricks*, 449 U.S. 250 (1980). The more difficult question to resolve involves the proper standard for determining when equitable doctrines should delay the running of the limitations period. That question was raised by this Court in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), but that case "pre-

sent[ed] no occasion to resolve that issue." 536 U.S. at 115 n.7. This petition places that issue squarely before the Court.

The time limit for filing a charge of discrimination with the EEOC is considered analogous to a statute of limitations and "is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). The Circuit Courts of Appeals have applied a variety of differing standards to these equitable doctrines. Courts have repeatedly noted that the case law in this area is "confused and contradictory." *Stitt v. Williams*, 919 F.2d 516, 522 (9th Cir. 1990); *see also*, *Bell v. Fowler*, 99 F.3d 262, 266 n.2 (8th Cir. 1996)(noting that "[e]quitable estoppel and equitable tolling are two distinct concepts often blurred by inconsistent use of the terminology"); *McAllister v. FDIC*, 87 F.3d 762, 767 n.4 (5th Cir. 1996)("Several courts, including the Supreme Court in *Irwin* [*v. Dep't of Veterans Affairs*, 498 U.S. 89 (1991)], have used the terms 'equitable tolling and 'equitable estoppel' interchangeably.").

The concepts of equitable estoppel and equitable tolling are similar but distinct doctrines. Perhaps the best description of the distinction between the two doctrines comes from Judge Posner's opinion in *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990). The *Cada* Court noted that equitable estoppel, which has also been referred to as fraudulent concealment, "comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations," and that equitable tolling "permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." *Cada*, 920 F.2d at 451.

The Fifth, Eighth, and Ninth Circuits essentially follow the same reasoning as that in *Cada* and hold that, under the equitable tolling doctrine, the limitations period will be tolled until facts which would support a charge of discrimination are

apparent or should be apparent to a person with a reasonably prudent regard for his rights, without regard to whether there is active misconduct by the employer. *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 931 (5th Cir. 1975), *cert. denied,* 435 U.S. 1010 (1978); *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1328-29 (8th Cir. 1995); *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000).

The First Circuit, taking a self-described "'narrow view' of equitable exceptions," allows for equitable tolling only where the employer actively misleads the employee. *See Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 185 & n.5 (1st Cir. 1989)(distinguishing *Reeb* and holding that equitable tolling is inapplicable because the employer did not actively mislead the plaintiff). The Fourth, Tenth and D.C. Circuits also require that there be active deception by the employer to give rise to equitable tolling. *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987)("t]he doctrines of equitable tolling and equitable estoppel have a common origin; they are based primarily on the view that a defendant should not be permitted to escape liability by engaging in misconduct that prevents the plaintiff from filing his or her claim on time"), *cert. denied,* 486 U.S. 1044 (1988); *Johnson v. United States Postal Serv.*, 861 F.2d 1475, 1481 (10th Cir. 1988)("in this circuit, a Title VII time limit will be tolled *only* if there has been 'active deception'")(emphasis in original), *cert denied*, 493 U.S. 811 (1989), *Washington v. Washington Metro Area Transit Auth.*, 160 F.3d 750, 752-53 (D.C. Cir. 1998) (rejecting equitable tolling argument where plaintiff failed to present any evidence of "affirmative misconduct" or "misleading" behavior by his employer), *cert. denied*, 527 U.S. 1038 (1999).

The Second and Third Circuits have followed the implication of language in this Court's opinion in *Electrical Workers v. Robbins & Myers*, 429 U.S. 229 (1976), to conclude that equitable tolling is appropriate only where the defendant

has actively misled the plaintiff respecting the cause of action, or when the plaintiff has in some extraordinary way been prevented from asserting his rights or has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *See Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2nd Cir. 1978); *Kocian v. Getty Refining & Marketing Co.*, 707 F.2d 748, 753 (3rd Cir. 1983), *cert. denied*, 464 U.S. 852 (1983). The Sixth Circuit has created its own five factor test for determining whether equitable tolling is applicable: (1) lack of notice of the filing requirement; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) the plaintiff's reasonableness in remaining ignorant of the particular legal requirement for filing his claim. *Truitt v. County of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998).

The Eleventh Circuit's decision in this case purports to rely upon an application of the equitable tolling doctrine, but as with many other decisions on the issue, it mistakenly merges the concepts of equitable tolling and equitable estoppel by suggesting that tolling is appropriate because the defendant actively deceived Byrd by concealing its true motivations. *Jones*, 331 F.3d at 1264. This case represents the perfect opportunity for this Court to resolve the question previously raised in *Morgan* while at the same time deciding which of these four differing applications of the equitable tolling doctrine is correct so as to eliminate any further confusion or contradictions between the circuits.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT AND PRECEDENT FROM OTHER CIRCUITS REGARDING THE KNOWLEDGE A CLAIMANT MUST POSSESS TO BEGIN THE RUNNING OF THE LIMITATIONS PERIOD.

Another facet of the equitable tolling doctrine that has created a division among the circuit courts concerns the degree of evidence of discrimination a plaintiff may possess before the equitable tolling doctrine is rendered inapplicable. The requisite knowledge for filing an administrative charge is certainly far less than what is required to file a lawsuit.

> [A] charge of employment discrimination is not the equivalent of a complaint initiating a lawsuit. The function of a Title VII charge, rather, is to place the EEOC on notice *that someone* (either a party claiming to be aggrieved or a Commissioner) *believes* that an employer has violated the title. The EEOC then undertakes an investigation into the complainant's allegations of discrimination.

EEOC v. Shell Oil Co., 466 U.S. 54, 68 (1984) (emphasis added).

This Court's holding in *EEOC v. Shell Oil* makes clear that the only evidence a person must possess to file a charge of discrimination is a "belief" that discrimination has occurred.

There is additional support for this principle in this Court's holding in *Morgan,* which implies that equitable tolling will become inapplicable once an employee believes he has been discriminated against. *National Railroad Passenger Corp., v. Morgan*, 536 U.S. 101, 115 n.7 (2002) (declining to reach the issue of equitable tolling for discrete acts of discrimination where there was a finding by the district court that "'Morgan *believed* that he was being discriminated against at the time that all of these acts occurred. . . .'") (emphasis added). Even

precedent from the Eleventh Circuit suggests that equitable tolling becomes inapplicable once an employee believes he has been discriminated against. *See Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 660 (11th Cir. 1993) (charging period might be tolled if, in the period prior to the 180 days before filing the EEOC charge, the plaintiffs "*had no reason to believe* that they were victims of unlawful discrimination.") (emphasis added), *cert. denied,* 513 U.S. 814 (1994).

A lessened evidentiary burden for the filing of an EEOC charge is appropriate because, unlike a lawsuit, the claimant has no duty to conduct a pre-filing investigation. *Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 268 (7th Cir. 1995) ("A plaintiff has no duty of prefiling investigation for an administrative complaint."); *Olson v. Mobil Oil Corp.*, 904 F.2d 198, 202 (4th Cir. 1990) ("The function of a charge is to initiate the EEOC investigation, . . . of employer actions which the employee believes violated the ADEA. . . . It is not necessary to the filing of a charge that one possess a proven case.") (citations and internal quotations omitted).

Despite the clear language from this Court's holding in *EEOC v. Shell Oil*, the Eleventh Circuit has held that a belief of discrimination is not enough to render the doctrine of equitable tolling inapplicable. Instead, the Eleventh Circuit grafted evidentiary requirements analogous to summary judgment procedures onto the tolling doctrine, holding that the limitations period must be tolled until a claimant has: (1) evidence within her possession to support a prima facie case; and (2) evidence to prove that an employer's stated reason is pretextual. *Jones*, 331 F.3d 1265 (discussing elements of prima facie case and evidence which is "insufficient to establish pretext"). No authority is cited for the assumed proposition that the same evidentiary measurements for granting or denying a summary judgment motion in a lawsuit apply to a determination as to whether a claimant has sufficient information to file a charge of discrimination.

In direct conflict with the Eleventh Circuit's holding, other Circuits hold that a claimant need not even possess evidence sufficient to support a prima facie case at the charge-filing stage. *See Pruet Production Co. v. Ayles*, 784 F.2d 1275, 1279 (5th Cir. 1986) (holding that the "showing required at the charge-filing stage is even more lenient" than is required to prove a prima facie case); *Vaught v. R.R. Donnelley & Sons Co.*, 745 F.2d 407, 411-12 (7th Cir. 1984) ("Facts more than sufficient to state a prima facie case are adequate to support a charge of discrimination.") (citations and internal quotations omitted). The Eleventh Circuit suggests that the limitations period for filing a charge should be tolled until an employee uncovers "truly damning evidence" or the "surfacing of telltale evidence." *Jones*, 331 F.3d 1264. Such a holding is in direct conflict with the tolling practice applied in other circuits.

The opinion which the Eleventh Circuit follows, *Sturniolo v. Sheafter, Eaton, Inc.*, 15 F.3d 1023 (11th Cir 1994), erroneously relies on two summary judgment opinions—*Slaughter v. Allstate Ins. Co.*, 803 F.2d 857 (5th Cir. 1986) and *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5 (1st Cir. 1990)—as support for its holding that the plaintiff did not have sufficient evidence to file a charge of age discrimination before learning of her younger replacement. While a "mere suspicion" or a "belief" will not provide a plaintiff with enough evidence to survive a summary judgment motion, precedent from this Court and other circuits makes clear that a "suspicion" or a "belief" of discrimination is all that is necessary to file an EEOC charge.

By applying the summary judgment evidentiary standard to the equitable tolling doctrine, the Eleventh Circuit mixed apples and oranges and has created a conflict between its holding and the prior holdings of this Court and other Circuit Courts of Appeal. This Court should take this opportunity to resolve the conflict between the circuits as to what quantum

of evidence is needed to render the equitable tolling doctrine inapplicable. Equity aids the vigilant, and there is no need to further extend a filing deadline for an administrative charge for a person who has already formed a belief that he or she has been discriminated against before the limitations period expired.

III. THE ELEVENTH CIRCUIT'S DECISION IS IN CONFLICT WITH OTHER CIRCUITS BECAUSE IT ALLOWS PLAINTIFFS TO WAIT TO FILE A CHARGE UNTIL THE EVIDENCE DEVELOPS TO FIT A PREFERRED METHOD OF PROOF.

The Eleventh Circuit's opinion is in conflict with those circuits that hold that the statute of limitations is tolled only until a reasonable person would have known there was a "*possible* violation of the age discrimination act." *Cada*, 920 F.2d at 451; *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1329 (8th Cir. 1995) (allowing invocation of equitable tolling when a reasonable person "would not be expected to know of the existence of a possible ADEA violation"); *Leong v. Potter*, 347 F.3d 1117 (9th Cir. 2003)(same). Instead, the Eleventh Circuit allowed Byrd to sit on her claim until evidence developed to fit her preferred prima facie case.

The Eleventh Circuit's decision will work an injustice to both employees and employers alike. For employers, the ruling does away with the certainty that the limitations period is intended to provide. *See Hill v. Georgia Power Co.*, 786 F.2d 1071, 1076 n.9 (11th Cir. 1986) ("Congress selected an abbreviated limitations period . . . to facilitate the twin goals of preventing stale claims and encouraging prompt resolution of employment disputes."). The Eleventh Circuit's opinion effectively destroys the purpose of the statute of limitations by allowing the limitations period to be indefinitely extended while an employee awaits the occurrence of some strand of

evidence that could be viewed as support for a preexisting belief of discrimination.

The Eleventh Circuit's opinion conflicts with the holdings of the Fifth and Seventh Circuits, which expressly state that an employee cannot wait to file an EEOC Charge until after the evidence develops to fit the plaintiff's preferred elements of a prima facie case. *See Stark v. Dynascan Corp.*, 902 F.2d 549, 552 (7th Cir. 1990) (refusing to toll the limitations period until plaintiff learned of younger replacement because "allowing plaintiffs to manipulate limitations periods by picking and choosing between different methods of prosecuting the same claim . . . would inject substantial uncertainty into the judicial system and frustrate the goal of encouraging the prompt resolution of disputes.") (internal quotations omitted); *Pacheco v. Rice*, 966 F.2d 904, 907 (5th Cir. 1992) (A plaintiff cannot wait to "discover instances of disparate treatment of other employees months or years after their discharge. It is to be expected that some relevant facts will come to light after the date of an employee's termination—one purpose of filing an administrative complaint is to uncover them.").

The Eleventh Circuit's holding also creates needless uncertainty for employees. Assume that all of the facts asserted by Byrd are true with one exception: the AASM hired to replace Byrd was the same age as Byrd. The later hiring of an individual the same age as Byrd should not preclude Byrd from filing a charge that her job had been eliminated months earlier due to an illegal age bias. What then becomes the starting point for the running of the statute of limitations? Clearly, the hiring of a worker the same age as Byrd would not be a triggering date. Would this Court follow the Eleventh Circuit's reasoning and hold that the limitations period is tolled until the next replacement is hired who happens to be substantially younger than Byrd (even if that hiring does not occur until months or years in the future)? If

so, then there is *no* statute of limitations for the filing of an EEOC Charge.

The petitioner submits that Byrd should have filed her charge within 180 days of when she first believed she was discriminated against. If an aggrieved employee follows the Eleventh Circuit's holding and waits for further evidence to support an already formed belief of discrimination, the employee risks losing her claim if the anticipated additional evidence never comes to fruition. The holding of other circuits requires that a charge be filed when one suspects that discrimination is a "possibility," not when one believes it is a certainty. By eliminating the necessity of absolute certainty, employees who believe they are victims of discrimination are free to proceed with the administrative process. The holding of the Eleventh Circuit in this case is not the prudent course and should be reversed.

It is clear that the limitations period began to run in this case, at latest, on June 12, 1999, when Byrd stated her belief that she had been discriminated against, noted her intent to file a lawsuit, and had evidence to suggest to her that the reason offered for the elimination of her position was a pretext for age discrimination. This Court should use this opportunity to provide a clear statement of the law on the doctrine of equitable tolling so that both employers and employees will understand when a given claim will be deemed time-barred.

IV. THE ELEVENTH CIRCUIT'S DECISION TO GRANT BYRD A FULL 180 DAYS FROM THE DATE SHE LEARNED THE LAST EVIDENCE TO SUPPORT HER CLAIM CONFLICTS WITH OTHER CIRCUITS.

Assuming equitable tolling applies in a given case, a conflict exists between the circuits as to how the tolling period is to be calculated. The Eleventh Circuit concluded

that equitable tolling automatically extends the limitations period for a full 180 days past the date Byrd discovered the identity of her alleged replacement, even though she discovered this information *more than three weeks before* the expiration of the 180 day period following cessation of Byrd's employment.[3] The Eleventh Circuit's analysis conflicts with the equitable tolling doctrine applied by other circuits where the plaintiff discovers the necessary information before the limitations period expires.

Excluding the decision of the Eleventh Circuit, there are two primary schools of thought among the circuits on how the doctrine is to be applied. The Seventh Circuit's Judge Posner penned the leading decision for the school of thought applying a "reasonable" time limit to any tolled period. The Seventh Circuit rejects the position assumed by the Eleventh Circuit, that tolling "bring[s] about an automatic extension of the statute of limitations by the length of the tolling period or any other definite term." *Cada*, 920 F.2d at 452. Instead, *Cada* held that that the equitable tolling doctrine only suspends the limitations period for a *reasonable* period of time after the necessary information has been obtained. *Id.* at 452-453.

The D.C. Circuit, the Third Circuit, and the Eighth Circuit have all followed the equitable tolling rule espoused in *Cada*. *See Phillips v. Heine*, 984 F.2d 489, 492 (D.C. Cir. 1993) (following *Cada* and holding that "[t]he purposes of the doctrine [of equitable tolling] are fully achieved if the court extends the time for filing by a reasonable period after the tolling circumstance is mended"), *cert. denied,* 510 U.S. 905 (1993); *New Castle County v. Halliburton NVS Corp.*, 111 F.3d 1116, 1126 n. 11 (3rd Cir. 1997) (noting the *Cada* rule

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[3] While the record is not clear regarding the date Byrd first learned that her job was being eliminated, she clearly was aware of this by May 22, 1999, when she resigned and accepted severance.

but not reaching the issue of what a reasonable period might be); *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1331 (8th Cir. 1995)(discussing *Cada* and rejecting plaintiff's claim that equitable tolling applied, where plaintiff learned information that "allowed him to tie everything together and form the belief that his termination was based on age discrimination" before the limitations period expired, but waited three months before filing a charge).

The Ninth Circuit has explicitly rejected the rationale of *Cada* and the cases which follow it. *See Socop-Gonzalez v. Immigration and Naturalization Service*, 272 F.3d 1176 (9th Cir. 2000). In *Socop-Gonzalez*, the Ninth Circuit held that equitable tolling should result in a calculation of days remaining for filing an action whereby the number of days which were tolled should be added back to the end of the limitations period and that, as long as the complaint is filed in that extended period, it is timely. The Ninth Circuit explicitly rejected Judge Posner's reasoning that if a reasonable period remained before the original limitations deadline after the tolling condition is eliminated, equity might not require that the period be extended even though a tolling condition had existed for a portion of the limitations period. *Id.* at 1195-96.

In reaching its conclusion, the Ninth Circuit concluded that *Cada* and its progeny are contrary to this Court's decision in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965), which held that when an action under the Federal Employers' Liability Act is incorrectly filed in a state court that is not a proper venue, the limitations period is tolled for the period until the state court's dismissal becomes final. The Ninth Circuit asserts, without explanation, that *Burnett* "foreclose[s] the approach to tolling taken in . . . *Cada*." *Socop-Gonzalez*, 272 F.3d at 1196.

The Ninth Circuit appears to have misread the meaning of *Burnett*. When the *Burnett* court rejected a "reasonable time," it was referring to the determination of when the

limitations clock would *start* ticking after the tolling condition was eliminated. The *Cada* "reasonable period" refers instead to the period when the resumed limitations clock would finally *stop* ticking, after it had resumed.

Strangely, a panel of the Ninth Circuit has cited this Court's opinion in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 n.5 (1984), as espousing the use of a "reasonable time" tolling doctrine such as the one used in *Cada*. *See Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1175 n.5 (9th Cir. 1986), *amended by* 815 F.2d 570 (9th Cir. 1987). Furthermore, this Court has cited with approval to *Cada* and Judge Posner's discussion of the principles of equitable tolling at least once. *See United States v. Ibarra*, 502 U.S. 1, 4 n. 2 (1991).

The Seventh Circuit's discussion in *Cada* provides the most sound reasoning as to why the limitations period should only be extended for what the court determines is a reasonable period of time.

> [Equitable tolling] gives the plaintiff extra time if he needs it. If he doesn't need it there is no basis for depriving the defendant of the protection of the statute of limitations. . . .
>
> In most cases in which equitable tolling is invoked, the statue of limitations has run *before* the plaintiff obtained information essential to deciding whether he had a claim. . . . When as here the necessary information is gathered after the claim arose but before the statute of limitations has run, the presumption should be that the plaintiff could bring suit within the statutory period and should have done so. The presumption will be more easily rebuttable the nearer the date of obtaining the information is to the date at which the statutory period runs out. In this case the interval was eight months, huge in the circumstances. We hold that a plaintiff who invokes equitable tolling to suspend the statute of limi-

> tations must bring suit within a reasonable time after he has obtained, or by due diligence could have obtained, the necessary information.

Cada, 920 F.2d at 452-53 (emphasis in original).

Byrd did not file her charge until February 24, 2000. Byrd, who had already determined to sue Dillard's, admits in her charge that she learned of her alleged replacement "[o]n or about November 1, 1999. . ." Byrd offered no explanation as to why she could not have filed her charge on or before November 18, 1999 (180 days from her last day at work). If the equitable tolling doctrine is applicable, it should only extend the limitations period a reasonable amount of time.

"[E]quity aids the vigilant and not those who slumber on their rights." *Kansas v.* Colorado, 514 U.S. 673 (1995) (citations and internal quotations omitted). Equitable notions should not be used to extend a deadline when plaintiff has all the information needed to pursue her claims and a reasonable period of time still remains before the expiration of the limitations period.

CONCLUSION

In today's workplace, large and small employers alike implement employment decisions affecting workforces which are frequently located across state lines—and not surprisingly in different judicial circuits. Opportunities for administrative and judicial review of even the most run of the mill employment actions are myriad. In such an environment, the ability to bring reliable and relatively quick closure to most employment disputes is a necessity.

Unfortunately, the variation of equitable tolling espoused by the Eleventh Circuit in this case seriously undermines these principles of finality. Moreover, the confused state of the law on notions of equitable tolling and equitable estoppel has created unnecessary conflict and disagreement between

the circuits. In the present state of things, a determination of the timeliness of an employee's EEOC charge depends largely on the law of the circuit where the charge is pending. The statutory scheme for addressing employment disputes is uniform; the judicial interpretation of those statutes should be uniform as well. Rarely will this court be presented with a case presenting a clearer fact pattern or more concrete timeline in which to provide the much needed guidance these issues deserve. For the reasons set forth herein, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-14145

PAMELA SUE JONES,

Plaintiff,

versus

DILLARD'S, INC.,

Defendant.

SARAH CROCKER, LANA HOUSE,
JAMES THOMPSON, DEBORAH T. GIBBONS,

Plaintiffs,

GERDA BYRD,

Plaintiff-Appellant,

versus

DILLARD'S, INC.,

Defendant-Appellee.

May 30, 2003, Decided
May 30, 2003, Filed

JUDGES: Before DUBINA and FAY, *Circuit Judges*, and DOWD,* *District Judge.*

OPINIONBY: DOWD, *District Judge:*

The above-captioned appeal from the Northern District of Alabama involves the discrimination claims asserted by

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* Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

Plaintiff-Appellant Gerda Byrd. Byrd was one of six plaintiffs who alleged that Defendant-Appellee Dillard's, Inc., took some adverse action against them in their jobs because of their age. Byrd's claims are grounded in the federal *Age Discrimination in Employment Act*, the *Alabama Age Discrimination in Employment Act*, and Alabama statutory fraud. The district court granted Dillard's motion for summary judgment as to all defendants on all claims. Byrd was the only plaintiff to appeal; thus, only her claims are at issue.

I. BACKGROUND

Plaintiff-Appellant Gerda Byrd began working for Gayfer's Department Store in Tuscaloosa, Alabama, in 1975. In August 1998, Dillard's, Inc. ("Dillard's" or the "Company"), purchased the Tuscaloosa store, but continued to employ its existing workforce. For the five years preceding the buyout, Byrd held the position of office and credit manager. Dillard's offered no such position within its organizational structure, but placed her in an assistant area sales manager ("AASM") position in order to keep her at the same rate of pay. Shortly thereafter, however, Byrd learned from Richard Lucas, also an AASM, that the store was eliminating AASM positions and that the store had no intention of ever employing AASMs again.

In May 1999, as part of its restructuring, Dillard's offered Byrd an opportunity to sell cosmetics on the sales floor. She declined, however, because she saw lagging store sales as a bad sign for commissions in that department. Moreover, Byrd feared that she would eventually be terminated for failing to reach sales-per-hour ("SPH") goals. Rather than risk termination, Byrd considered her other options. As a manager with her position being eliminated, she was entitled to fill another managerial position in the store or take severance pay. She opted for the latter. Dillard's approved her severance request in May 1999, and she left in the same month. In all, Byrd received forty-seven weeks of severance pay.

On June 8, 1999, Byrd spoke to Andy Poole, operations manager at Dillard's, who told her that the company instructed him to hire two new AASMs. (Byrd Dep. Tr. at 55, Ex. 2 at 5 (D. Ct. Doc. No. 15).) Byrd recorded her reaction to this news in some typewritten notes:

> This happens after I was told [that] the store could not afford any AASM[]s . . . because they were not making their figures. Seems to me [that] I was lied to!!! As soon as I find out there are two new AASM[s] in place[,] I will file a lawsuit against Dillard[']s. This lawsuit will be for [a]ge discrimination and [w]age discrimination. Seems to me [that] they wanted to get rid of me . . . by demoting me to the floor, and[,] after several paycuts [] because I could not meet my SPH[,] fire me.

(Byrd Dep. Tr. at 45, Ex. 2 at 5.)

In September 1999, Tiffany Winters applied for an AASM position at the Tuscaloosa store, and was hired a month later. Byrd testified that she heard Poole say that Winters was "young and pretty," and that he "had to hire her." (Byrd Dep. Tr. at 67, 70.)

At the time Byrd left the company, she was only aware of poor sales as the Company's reason for eliminating the AASM position. She admitted having no evidence that the store manager knew at the time that the position would be reinstated later that year. Byrd testified that, despite the lack of evidence, she felt certain someone in the company knew her former position was not really eliminated because Winters was hired in that position so soon after she left.

II. PROCEDURAL POSTURE

Byrd filed her administrative charge with the Equal Employment Opportunity Commission ("EEOC") on February 24, 2000. In December 2000, Byrd and the other plaintiffs filed a complaint in federal court, alleging claims under the

federal *Age Discrimination in Employment Act* ("ADEA"), the *Alabama Age Discrimination in Employment Act* ("AADEA"), and an Alabama fraud statute.

Dillard's filed a motion for summary judgment as to the claims of Byrd and the other plaintiffs. The Company argued that Byrd's claim was time-barred because Byrd failed to file her EEOC charge within 180 days of any alleged act of discrimination. Dillard's argued that her state discrimination claim was also time-barred because the AADEA simply adopted the ADEA's limitations period. Alternatively, it argued that Byrd had no direct or circumstantial evidence of age discrimination, which required judgment in its favor on the merits. With respect to Byrd's fraud claim, Dillard's argued in its motion that no evidence showed it made a false representation to her, but that only another store employee indicated that the AASM position was being permanently eliminated. Further, she did not actually rely on any such statements, that any reliance was unreasonable, that she had no evidence of an intent to deceive, and that she did not suffer cognizable damages.

The district court granted the Company's motion for summary judgment as to all of Byrd's claims. It found that Byrd had reason to believe she had suffered age discrimination before the 180 days preceding her EEOC charge. Specifically, the district court found that her pre-resignation discussions with co-workers and her June 8, 1999, discovery of the reinstatement of the AASM position were sufficient to start the running of the statute of limitations. In addition, the court found that the AADEA's statute of limitations was, at most, 180 days because the language of the statute mirrored that of the ADEA. Thus, the court held that Byrd's AADEA claim was also time-barred. Finally, the district court found that there was no evidence the Company's allegedly false statement caused her any injury. Instead, the court found that Byrd resigned because she was being transferred to cosmetics

and did not want to work in that department, not because of the elimination of the AASM position.

The court also denied Byrd's motion to alter or amend its judgment. (Order dated June 25, 2002, at 3 (D. Ct. Doc. No. 31).)

III. ANALYSIS

The Court reviews *de novo* a lower court's decision to grant summary judgment. *Pennington v. City of Huntsville*, 261 F.3d 1262, 1265 (11th Cir. 2001); *Patrick v. Floyd Med. Ctr.*, 201 F.3d 1313, 1315 (11th Cir. 2000). A district court's entry of summary judgment should be affirmed if, after construing the evidence in a light most favorable to the non-movant, the reviewing court finds that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *William Penn Life Ins. Co. of New York v. Sands*, 912 F.2d 1359, 1361 (11th Cir. 1990).

We now turn to examine the district court's rulings on each of Byrd's claims under this legal standard. As discussed herein, we reverse on the ADEA claim, certify a question to the Alabama Supreme Court on the AADEA claim, and affirm on the fraud claim.

A. The ADEA Claim

The period in which a person must file a complaint with the EEOC depends on whether a state is a "deferral state" under the ADEA. Deferral states are those that have a state agency equivalent to the EEOC. *See* 29 U.S.C. §§ 626(d), 633 (1999); *see also American Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111 (1st Cir. 1998); *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878 (5th Cir. 1991). In these states, a person must file an age discrimination claim with the EEOC within 300 days after the alleged unlawful practice occurred. 29 U.S.C. § 626(d)(2). In states without a

state equivalent to the EEOC, the ADEA requires a charge to be filed within 180 days. 29 U.S.C. § 626(d)(1). Alabama has a state discrimination statute, the AADEA, but does not have an EEOC equivalent. Thus, the Court examines the timeliness of Byrd's ADEA claim in the context of the 180-day rule. The parties do not dispute that the applicable charging period is 180 days.

What the parties dispute, however, is when that period starts to run. The proper focus for when a statute of limitations begins to run is the time of the discriminatory act. *Chardon v. Fernandez*, 454 U.S. 6, 8, 70 L. Ed. 2d 6, 102 S. Ct. 28 (1981); *Nance v. Maxwell Fed. Credit Union*, 186 F.3d 1338, 1341 (11th Cir. 1999). Three possible dates can be construed as the unlawful practice that triggered the limitations period: (1) April or May 1999, when Byrd was told that her position was being eliminated; (2) June 12, 1999, when she took notes about her discovery of two new AASMs to be hired and her plans to sue for age discrimination; or (3) November 1, 1999, when she learned that a 28-year-old woman had been hired to fill her former AASM position.

Byrd argues in support of the third date. She says that, at the time her position was eliminated, she was only aware of purported financial reasons for the elimination of her job. Byrd asserts that she could not file a complaint until she became aware of the Company's discriminatory intent. On this date, she learned from Poole that Winters had been hired in her place. Thus, Byrd contends, the limitations period did not begin to run until November 1, 1999, bringing her EEOC charge filed on February 24, 2000, within the limitations period.

Alternatively, Byrd argues that, even if the Company's discriminatory act occurred earlier, the limitation period should be equitably tolled based on the evidence that was available to her. Relying on *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023 (11th Cir. 1994), Byrd stresses that mere

suspicion of age discrimination, absent personal knowledge of discrimination, will not constitute pretext. She says that, like the plaintiff in *Sturniolo*, she did not know she was a victim of discrimination until she confirmed that Dillard's had hired a younger person to fill her former position. Because she could not have based a claim on rumor, she needed to wait until she knew that discrimination occurred. Thus, she argues, summary judgment was improper as to her ADEA claim.

Dillard's argues in support of the second date, or when she took notes about her suspicions of age discrimination. Her notes are dated June 12, 1999, in which she described hearing from Poole that two AASMs were to be hired. Dillard's also asserts that, unlike *Sturniolo*, where the plaintiff had no reason to doubt the employer's explanation for several months, Byrd had cause to doubt the reasons given for her transfer to cosmetics long before the 180 days leading to her EEOC charge.

Reviewing the case law in this area, we observe that some employers will seek to avoid liability by observing the letter of the law, while truly ignoring its spirit. *See Kolstad v. Am. Dental Assoc.*, 527 U.S. 526, 551, 144 L. Ed. 2d 494, 119 S. Ct. 2118 (1999) ("An employer[] may, for example, express hostility toward employment discrimination laws or conceal evidence regarding its "true" selection procedures because it knows they violate federal law."); *see also Rollins v. Tech-South, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987) (noting that direct evidence of discrimination is rarely available to the plaintiff, which, presumably, is because malicious employers disguise their conduct). The malicious employer can attempt to circumvent ADEA liability by timing its discriminatory acts. Firing an employee for "financial" reasons, concealing the true motivation (*i.e.*, age), and then replacing that employee with someone outside of the protected class six months later is all that may be necessary to discriminate

illegally, yet escape liability. If the employee acts on a mere suspicion, he has acted prematurely: the employee's claim will likely fail because the truly damning evidence has not yet emerged-and will not emerge given the defendant's revelation of the suit. If, on the other hand, the employee lies in wait for the surfacing of telltale evidence, *i.e.*, the hiring of a younger employee, the cunning employer will escape liability by postponing the hiring of a replacement for at least six months. Thus, an employee thrust into this situation faces two equally unattractive options, neither furthering the ADEA's purpose.

Disputes of this sort can be traced back as early as 1975 in the case of *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975).[1] In *Reeb*, the defendant-employer wrote a letter to the plaintiff-employee indicating that her monthly contract of employment would not be renewed for financial reasons. The letter also indicated that she would be terminated effective immediately. The plaintiff's position was refilled only two months later, but she did not learn this until several months later. The district court dismissed the case because the plaintiff had not filed her administrative complaint within the applicable charging period.[2]

The plaintiff prevailed on appeal. In a pronouncement that would be echoed by various circuits across the country, the Fifth Circuit held that, under equitable modification, the applicable limitations period did not begin to run "until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his [or her] rights," *id.* at 930. *See, e.g., Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1389 (3d

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[1] This Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981, *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), which would include *Reeb*.

[2] The applicable charging period required an administrative complaint to be filed within 90 days.

Cir. 1994); *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1531-32 (11th Cir. 1992); *Vaught v. R.R. Donnelley & Sons Co.*, 745 F.2d 407, 410-12 (7th Cir. 1984); *Wilkerson v. Siegfried Ins. Agency, Inc.*, 683 F.2d 344, 345-46 (10th Cir. 1982).

The effect of *Reeb* was to close the loophole used by the malicious employer to avoid age discrimination liability. "[W]here wrongful concealment of facts is alleged, . . . a party responsible for such wrongful concealment is estopped from asserting the statute of limitations as a defense." *Reeb*, 516 F.2d at 930. "'[N]o [person] may take advantage of his [or her] own wrong." *Id.* (quoting *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-33, 3 L. Ed. 2d 770, 79 S. Ct. 760 (1959)). These equitable considerations have been repeated numerous times in subsequent decisions of several courts. *See, e.g., Oshiver*, 38 F.3d at 1388-89; *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987).

Building on *Reeb* is the case of *Sturniolo*, where the plaintiff-employee was a sales manager who was fired as part of, he was told, a reorganization and consolidation of positions in the company. The plaintiff discovered, however, that the company replaced him within three months with a significantly younger employee. The district court, refusing to apply any equitable modification, granted summary judgment to the employer for the plaintiff's failure to bring a charge to the EEOC within 180 days of his termination.

This Court reversed, holding that a genuine issue of material fact precluded summary judgment on whether equitable modification applied. *Id.* at 1025-26. To reach its decision, the Court looked to the elements of a *prima facie* case for age discrimination, *id.* at 1025,[3] and made the following observa-

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[3] The elements it looked to were: "the plaintiff is in the protected group; (2) the plaintiff applied and was qualified for a job for which the employer was seeking applicants; (3) the plaintiff was rejected or

tions about the evidence: "At the time of his discharge, [the plaintiff] believed [his employer's] reasons for terminating him were business related and [he] was not aware of the [company's] intent to hire a younger individual to replace him." *Id.* The plaintiff was told that the region he managed was being consolidated as part of another region. *Id.* at 1026. Although the evidence suggested that the plaintiff "suspected" age discrimination at the time of his discharge, "a discharged employee's mere suspicion of age discrimination, unsupported by personal knowledge of discrimination, will not constitute pretext." *Id.* It was not until several months later that the plaintiff learned of his younger replacement. *Id.* "[A]t that point[,] [the plaintiff] had knowledge of facts sufficient to support a prima facie case of age discrimination." *Id.*

In light of the teachings of *Sturniolo* and the other cases we have cited, we examine the evidence in the instant case. First, Byrd testified at her deposition that she learned the AASM positions were being discontinued for financial reasons. (Byrd Dep. Tr. at 13, 22-23.) Indeed, she had seen company documentation indicating that store sales were low. (Byrd Dep. Tr. at 76.) Byrd also testified that she was apprehensive about taking a cosmetics job because of her concern for meeting sales goals in light of overall store sales. (Byrd Dep. Tr. at 12.) This evidence suggests that the reason given by Dillard's for the elimination of Byrd's position not only appeared business-related, but also believable. A person with reasonably prudent regard for her rights would not suspect a cause of action for age discrimination at this point.

Second, Byrd testified that, on June 8, 1999, the operations manager told her he would be hiring two new AASMs. (Byrd Dep. Tr. at 55-57.) This prompted Byrd to take notes about

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demoted; and (4) following the plaintiff's discharge, the employer replaced him with someone of comparable qualifications outside the protected class." *Sturniolo*, 15 F.3d at 1025.

her budding suspicions and intent to file suit once her former position was filled by a younger employee. (Byrd Dep. Tr. at 45-46.) At this point, the evidence available to Byrd is thin. She has no evidence of the Company's intent to hire a younger employee. About all she knows is that the AASM position is being reinstated contrary to what she previously heard. While Byrd has no other evidence, she suspects that her job was eliminated because of her age. Nevertheless, *Sturniolo* teaches that Byrd's suspicion, without more, is insufficient to establish pretext. Not until November 1999 is her suspicion confirmed by the hiring of Winters. At this time, she has sufficient evidence to support her age discrimination claim.

Again, the proper focus for when a statute of limitations begins to run is the time of the discriminatory act. *Chardon*, 454 U.S. at 8; *Nance*, 186 F.3d at 1341. This rule would suggest that, among the three above dates, the first choice, April or May 1999, was the appropriate starting date of the limitations period for Byrd's claims. The Court finds, however, that this case bears sufficient similarity to *Sturniolo* to apply equitable tolling. As such, the charging period did not begin until Byrd learned of the Company's hiring of Winters, or November 1, 1999.

Moreover, cases decided by this Court after *Sturniolo* suggest that November 1, 1999, is the correct starting date. In *Hargett v. Valley Federal Savings Bank*, 60 F.3d 754 (11th Cir. 1995), the plaintiff-employee worked as a probationary employee for the defendant-bank for just over five months, from June 1990 to November 1990. Then, the defendant discharged plaintiff, citing market conditions as its reason. In early 1991, however, during a visit to the bank, the plaintiff learned of a younger employee purporting to perform his former duties. On November 15, 1991, the plaintiff filed an EEOC questionnaire, alleging that the bank had discriminated against him on the basis of his age. On February 11, 1992, he

filed a sworn charge of discrimination with the EEOC alleging, among other things, age discrimination. On September 25, 1992, he filed suit for age discrimination in federal district court. The court granted summary judgment to the bank on the basis that the plaintiff's EEOC charge was untimely.

Affirming the district court, this Court looked to the November 15, 1990, date that was cited by the plaintiff to determine that his November 1991 EEOC questionnaire and February 1992 EEOC charge were filed outside the 180-day charging period. *Id.* at 760-61. "A plaintiff, who is aware that he is being replaced in a position, which he believes he is able to perform, by a person outside the protected age group, knows enough to support filing a claim." *Id.* As liberally as the Court could construe the filing date of plaintiff's charge, his excessive delay, which exceeded the applicable limitations period, was unmistakable. As a consequence, this Court upheld the district court's characterization of the plaintiff's age discrimination claim as untimely.

In another case, *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428 (11th Cir. 1998), the plaintiff was a longstanding employee of the defendant, accumulating almost thirty years of service at the time he left the defendant-utility company. In February 1990, he was demoted for failing to demonstrate job improvement during the prior year. The plaintiff presented evidence that, beginning at the time of his demotion, the utility denied him the same training offered to his younger colleagues. He was told that he was incapable of learning new skills. By July 1993, he had accumulated four consecutive annual reviews that rated his performance "below acceptable." He was transferred to another department. The plaintiff then obtained counsel, who prepared a written protest against the transfer, but did not yet file an administrative charge. Then, on October 12, 1994, the utility informed the plaintiff that he would not be considered for a position for which he recently applied.

On December 16, 1994, the plaintiff filed a charge with the EEOC, and subsequently filed suit in federal court. The utility filed for summary judgment, arguing among other things that the plaintiff's claims were untimely. The district court agreed, and granted summary judgment to the utility. The plaintiff appealed, but only as to his ADEA claim for the October 1994 denial of another position. He contended that the decision to turn him down was based on poor evaluations, which, in turn, were based on the utility's improper denial of training.

This Court affirmed the decision of the district court. It held that the utility's allegedly discriminatory act of denying the plaintiff a new position was time barred. *Id.* at 1435. The plaintiff conceded that the October 1994 denial of the position he applied for was not discriminatory on its face, but argued that the failure to train from February 1990 to July 1993 gave rise to the utility's denying him the position. A plaintiff, however, may not use time-barred evidence to help establish a *prima facie* case of discrimination. *Id.* "[E]vidence of [the utility's] prior training practices cannot render discriminatory [its] facially neutral decision to deem [the plaintiff] unqualified for the [position]." *Id.* Since the denial of training occurred years ago, plainly outside the applicable statute of limitations, the Court refused to consider it as part of the plaintiff's claim of refusal to hire.

The panel also rejected the application of equitable tolling. *Id.* at 1435. The charging period "might have been tolled if, in the period prior to the 180 days before filing the initial EEOC charge, [the plaintiff] had no reason to believe he was a victim of unlawful discrimination." *Id.* (relying on *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 660 (11th Cir. 1993)). Seeing evidence, however, that the plaintiff protested vigorously against the utility's failure to provide equal training opportunities, the Court refused to apply equitable

tolling to preserve his rights. *Id.* Thus, the limitations period barred the plaintiff's claims.

In both *Hargett* and *Turlington*, the plaintiffs had sufficient evidence of their age discrimination claims to file an EEOC charge within the limitations period. In *Hargett*, the plaintiff learned of his younger replacement, but still waited eleven months to complete an EEOC questionnaire and another three months before filing an EEOC charge. In *Turlington*, the plaintiff had sufficient evidence of age discrimination when he was excluded from training programs available to his younger colleagues. His knowledge of this evidence was demonstrated by his vigorous protest and soliciting the help of a lawyer to combat his employer's practices. These decisions are wholly consistent with the rationale of the early case of *Reeb:* The applicable limitations period did not begin to run until the facts supporting a cause of action became apparent or should have became apparent to a reasonably prudent person with concern for his or her rights.

Unlike the plaintiffs in *Hargett* or *Turlington*, Byrd had only a mere suspicion of age discrimination until Dillard's hired Winters in her stead. Until then, the record makes clear that she only knew her position was being eliminated, that the Company's reasons for the elimination seemed legitimate from what she knew about store sales, and that Dillard's had suspiciously reinstated the AASM position in the store.

As with the plaintiff in *Sturniolo*, equitable tolling operates to save Byrd's claims. Again, with no evidence supporting a cause of action for age discrimination until Dillard's hired Winters, the third option is the only one consistent with our precedent and the facts of this case. Moreover, we are unwilling to close the door on her claims based simply on her handwritten note that she suspected age discrimination.

Accordingly, the district court erred in granting summary judgment on Byrd's ADEA claim.[4]

B. The AADEA Claim

Substantial doubt about a question of state law upon which a particular case turns should be resolved by certifying the question to the state supreme court. *Moreno v. Nationwide Insur. Co.*, 105 F.3d 1358, 1360 (11th Cir. 1997) (citing *Forgione v. Dennis Pirtle Agency, Inc.*, 93 F.3d 758, 761 (11th Cir. 1996)). Resolution in this way avoids the unnecessary practice of guessing the outcome under state law and offers the state court an opportunity to explicate state law. *Id.* In this case, we find sufficient cause to certify a question to the Alabama Supreme Court with respect to the limitations period under the Alabama Age Discrimination in Employment Act.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF ALABAMA PURSUANT TO RULE 18 OF THE ALABAMA RULES OF APPELLATE PROCEDURE.

TO THE SUPREME COURT OF ALABAMA AND THE HONORABLE JUSTICES THEREOF:

Byrd argues that her AADEA claim is not time-barred because the AADEA's statute of limitations is two years and that she filed her claim within that period. Byrd contends that

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[4] Dillard's also argues that it is entitled to summary judgment on the merits of Byrd's ADEA claim. The district court, however, did not address that issue. Although we have the authority to affirm an entry of summary judgment on other grounds, *Robert Suris Gen. Contractor Corp. v. New Metro. Fed Sav. & Loan Ass'n*, 873 F.2d 1401, 1406 n.8 (11th Cir. 1989), we make no ruling as to the merits of Byrd's ADEA claim, leaving that issue for the district court to address in the first instance. *See, e.g., Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1322; *Uboh v. Reno*, 141 F.3d 1000, 1007 (11th Cir. 1998).

the 180- and 90-day ADEA limitations periods referred to in the Alabama statute can only be interpreted as referring to the federal administrative requirements. Byrd also notes that at least one federal district court has held that the AADEA's statute of limitations is two years.[5] (Appellant's Br. at 18 (citing *Dooley v. AutoNation USA Corp.*, 218 F. Supp. 2d 1270, 1276 (N.D. Ala. 2002).) Alternatively, Byrd argues that if this Court finds that a 180-day limitation period should apply, the period did not begin to run until Byrd discovered that Dillard's hired the 28-year-old Winters, or the time period was equitably tolled until she found out about the hiring.

Dillard's responds that Byrd's contention that the AADEA has a two-year statute of limitations ignores the plain meaning of the statute. It contends that the AADEA simply incorporates the statute of limitations of the ADEA. Dillard's also contends that the Alabama federal court incorrectly decided that the AADEA had a two-year statute of limitations and refers to an Alabama state case which held that, like the ADEA, plaintiffs have 90 days to file suit after the EEOC issues its notice of the right to sue. (Appellee's Br. at 23 (citing *Herbst v. Raytheon Co., Inc.*, No. CV-00-485, slip. op. at 2 (Ala. Cir. Ct. Dec. 12, 2000).) Therefore, Dillard's contends, Byrd's AADEA claim is time-barred because she filed her claim outside the statute of limitations period. Byrd reiterates her assertions in her reply brief and adds that the Alabama state case on which Dillard's relies was incorrectly decided.

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[5] We note that, since the parties have filed their briefs, another federal district court has come up with a solution for interpreting the AADEA's statute of limitations, *Robinson v. Regions Fin. Corp.*, 242 F. Supp. 2d 1070, 1076-77 (M.D. Ala. 2003). This court proposed a variable rule, where a claim would be deemed timely if filed within the longer of (a) the time prescribed for filing a federal ADEA claim or (b) 450 days of the discriminatory act. *Id.*

The AADEA provides in relevant part:

> Any employment practice authorized by the federal Age Discrimination in Employment Act shall also be authorized by this article and the remedies, defenses, and statute of limitations, under this article shall be the same as those authorized by the [ADEA] except that a plaintiff shall not be required to pursue any administrative action or remedy prior to filing suit under this article.

Ala. Code § 25-1-29 (1997). The Alabama Code also provides a two-year default statute of limitations where the appropriate limitation period is not enumerated specifically in the code. Ala. Code. § 6-2-38(l) (1984).

On its face, the AADEA provides that it has the same statute of limitations as the ADEA. The ADEA, however, has two such limiting periods: 180 days and 90 days. Under the ADEA, a plaintiff has 180 days from the occurrence of the allegedly unlawful practice to file a charge of age discrimination with the EEOC.

Once a plaintiff has received notice that the EEOC has dismissed the charge, she has 90 days to file her suit. 29 U.S.C. § 626(d)(1) and (e). Thus, the ADEA's statutes of limitations are intertwined with its administrative requirements.

Because of how the limitations operate in the ADEA, it is difficult, if not impossible, to transfer them to the AADEA. For example, does a plaintiff have to file suit under the AADEA within 90 or 180 days of the allegedly unlawful conduct, or does a plaintiff receive a combined total of 270 days to file suit? Even if a plaintiff were given 270 days, this would still not be the same amount of time given a plaintiff under the ADEA because, under the ADEA, the 90 days do not begin to run until the plaintiff has received notice from the EEOC that a claim has been dismissed, 29 U.S.C. § 626(e); *Santini v. Cleveland Clinic Florida*, 232 F.3d 823,

825 (11th Cir. 2003). Alternatively, does the state default rule apply? As shown here, we can only guess as to whether the statute of limitations precludes Byrd's AADEA claim.

The Alabama Supreme Court has not answered this question. The state appellate courts offer no definitive guidance. Therefore, we certify the question to the Alabama Supreme Court as follows: WHAT IS THE APPLICABLE LIMITATIONS PERIOD FOR A CLAIM BROUGHT UNDER THE AADEA?

To facilitate the resolution of this question, we direct the Clerk to transmit the entire record of this case, together with copies of the parties' briefs, to the Alabama Supreme Court.

C. The State-law Fraud Claim

Byrd asserts Alabama courts have consistently held that employees can maintain actions against their former employers for fraud in connection with acceptance, termination, or conditions of employment. Byrd alleges that Dillard's committed fraud when it misrepresented to her the material fact that the AASM position was being permanently eliminated, intending to deceive her about the possibility of reinstating the AASM position. Byrd contends that her reliance was reasonable because she observed a decrease in business and found plausible the story about eliminating the position. Finally, Byrd contends that she was injured by the Company's misrepresentations because she resigned under the belief her position was being eliminated and was forced to work at a significantly lower rate of pay and suffered great emotional distress.

Dillard's responds that it did not commit fraud because it made no material misrepresentation to Byrd, as her position was eliminated because of budget constraints. Dillard's asserts that Byrd has not shown any evidence of an intent to deceive at the time Dillard's told her that her position was being eliminated. The Company notes that Byrd's reliance on

its alleged misrepresentation was unreasonable because she jumped to the conclusion that she would not be successful in the cosmetics area, did not talk to anyone working in the cosmetics area, and did not attempt to work in that area before resigning. Dillard's further asserts that Byrd suffered no damages because she made more money with the combination of her severance and her Stein Mart pay than she would have received in her AASM position. In her reply, Byrd reiterates her fraud claim and adds that the store manager told her and another employee that Dillard's was permanently eliminating the AASM position.

Under Alabama law, the elements of fraudulent misrepresentation are: "(1) a misrepresentation of material fact; (2) made willfully to deceive, recklessly, without knowledge, or mistakenly, (3) that was reasonably relied upon by the plaintiff under the circumstances, and (4) that caused damage as a proximate consequence." *Brushwitz v. Ezell*, 757 So. 2d 423, 429 (Ala. 2000); Ala. Code § 6-5-101 (1975).

Even construing the evidence in a light most favorable to Byrd, the district court correctly granted summary judgment on her fraud claim because she did not meet all of the required elements. Specifically, as the district court pointed out, Byrd did not present evidence that provided any genuine issue of material fact as to the fourth prong of the fraud claim, *i.e.*, that damage was caused as a proximate consequence of the alleged misrepresentation. Byrd did not resign from Dillard's because she was told that the AASM position was being eliminated. She did not want to work in cosmetics because she did not think that she could sell enough products to equal her previous salary. The evidence does not support that she made any effort to investigate whether she actually could match her previous salary if she chose to sell cosmetics. Therefore, given the reasons for her resignation, her reduced income after she left Dillard's was not a proximate consequence of the Company's alleged misrepresentation. Accord-

ingly, because Byrd cannot satisfy all the elements of a fraud claim, this Court should affirm the district court's dismissal of that claim.

IV. CONCLUSION

The district court erred in granting summary judgment to Dillard's on Byrd's ADEA claim. Therefore, we reverse the district court on the ADEA claim, and vacate the entry of summary judgment to Dillard's. We delay remand, however, until the Alabama Supreme Court has an opportunity to define the applicable limitations period to Byrd's claim under the AADEA. The entire record in this case, together with copies of the briefs of the parties, shall be transmitted herewith. Further, the district court properly granted summary judgment to Dillard's on Byrd's state-law fraud claim. Therefore, we affirm the district court's judgment on this claim.

AFFIRMED IN PART, REVERSED AND VACATED IN PART, AND QUESTION CERTIFIED.

APPENDIX B

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed April 28, 2004]

No. 02-14145

D.C. Docket Nos. 00-3646 CV-N-W &
00-03647-CV-N-W

PAMELA SUE JONES,

Plaintiff,

versus

DILLARD'S, INC.,

Defendant.

SARAH CROCKER, LANA HOUSE, JAMES THOMPSON, DEBORAH T. GIBBONS,

Plaintiffs,

GERDA BYRD,

Plaintiff-Appellant,

versus

DILLARD'S, Inc.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(April 28, 2004)

Before DUBINA and FAY, *Circuit Judges*, and DOWD,* *District Judge*.

PER CURIAM:

This appeal from the Northern District of Alabama involved claims by the plaintiff-appellant, Gerda Byrd, grounded in the federal Age Discrimination in Employment Act (ADEA), the Alabama Age Discrimination in Employment Act (AADEA), and Alabama common law fraud. The district court had granted defendant-appellee's motion for summary judgment as to all defendants on all claims and Byrd appealed.

On May 30, 2003, this Court affirmed the district court's dismissal of the fraud claim, but reversed the district court on the ADEA claim. *Jones v. Dillard's, Inc.*, 331 F.3d 1259 (11th Cir. 2003). We held that equitable tolling applied, with the result being that the 180-day limitations period for filing a charge of discrimination did not begin to run until Byrd learned that she had been replaced by a younger employee, notwithstanding her earlier suspicion of age discrimination. *Id.* at 1266. We, therefore, concluded that Byrd's EEOC charge was timely filed. We also certified a question to the Alabama Supreme Court, *id.* at 1269, and expressly delayed remand until that court had a chance "to define the applicable limitations period to Byrd's claim under the AADEA." *Id.* at 1270.

On April 2, 2004, the Alabama Supreme Court answered the following question: "'What is the applicable limitations period for a claim brought under the [Alabama Age Discrimination in Employment Act, Ala. Code 1975, § 25-1-20 through § 25-1-29]?'" *Byrd v. Dillard's, Inc.*, No. 1021439,

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* Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

slip op. at 1 (Ala. Apr. 2, 2004) (per curiam) (quoting *Jones v. Dillard's, Inc.*, 331 F.3d at 1269). That court stated:

> [W]e hold that the § 25-1-29 incorporates the statutes of limitations of the ADEA as follows:
>
> (1) If a plaintiff files an AADEA claim in a state court within 180 days from the occurrence of the alleged unlawful practice, the applicable limitations period for filing a charge with the EEOC, then that plaintiff's claim is timely.
>
> (2) If a plaintiff files a charge with the EEOC within 180 days from the occurrence of the alleged unlawful practice and thereafter receives notice that the EEOC has dismissed the charge, then that plaintiff's AADEA claim filed in the state court within 90 days after the EEOC's notice of dismissal of the charge is timely.

Byrd v. Dillard's, Inc., slip op. at 8.[1]

Accordingly, we vacate the entry of summary judgment to Dillard's on the ADEA claim and the AADEA claim and we affirm the judgment with respect to the fraud claim. We remand for further proceedings consistent with this opinion and the opinion of May 30, 2003.

AFFIRMED IN PART, REVERSED AND VACATED IN PART.

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[1] The opinion of the Alabama Supreme Court is attached hereto as Appendix A.

APPENDIX

SUPREME COURT OF ALABAMA
OCTOBER TERM, 2003-2004

[Filed Apr. 5, 2004]

1021439

GERDA BYRD,

v.

DILLARD'S, INC.

Certified Question from the United States Court of Appeals for the Eleventh Circuit

(No. 02-14145)

PER CURIAM.

The United States Court of Appeals for the Eleventh Circuit has certified the following question to this Court pursuant to Rule 18, Ala. R. App. P.: "What is the applicable limitations period for a claim brought under the [Alabama Age Discrimination in Employment Act, Ala. Code 1975, § 25-1-20 through § 25-1-29]?" *See Jones v. Dillard's, Inc.*, 331 F.3d 1259, 1269 (11th Cir. 2003). This Court accepted the certified question and now answers the question.

The facts of this case are stated in the Court of Appeals' opinion certifying the question:

> "Plaintiff-Appellant Gerda Byrd began working for Gayfer's Department Store in Tuscaloosa, Alabama, in 1975. In August 1998, Dillard's, Inc. ('Dillard's' or the 'Company'), purchased the Tuscaloosa store, but continued to employ its existing workforce. For the five

years preceding the buyout, Byrd held the position of office and credit manager. Dillard's offered no such position within its organizational structure, but placed her in an assistant area sales manager ('AASM') position in order to keep her at the same rate of pay. Shortly thereafter, however, Byrd learned from Richard Lucas, also an AASM, that the store was eliminating AASM positions and that the store had no intention of ever employing AASMs again.

"In May 1999, as part of its restructuring, Dillard's offered Byrd an opportunity to sell cosmetics on the sales floor. She declined, however, because she saw lagging store sales as a bad sign for commissions in that department. Moreover, Byrd feared that she would eventually be terminated for failing to reach sales-per-hour ('SPH') goals. Rather than risk termination, Byrd considered her other options. As a manager with her position being eliminated, she was entitled to fill another managerial position in the store or take severance pay. She opted for the latter. Dillard's approved her severance request in May 1999, and she left in the same month. In all, Byrd received forty-seven weeks of severance pay.

"On June 8, 1999, Byrd spoke to Andy Poole, operations manager at Dillard's, who told her that the company instructed him to hire two new AASMs. (Byrd Dep. Tr. at 55, Ex. 2 at 5 (D. Ct. Doc. No. 15).) Byrd recorded her reaction to this news in some typewritten notes:

> "'This happens after I was told [that] the store could not afford any AASM[]s . . . because they were not making their figures. Seems to me [that] I was lied to!!! As soon as I find out there are two new AASM[s] in place [,] I will file a lawsuit against Dillard['s. This lawsuit will be for [a]ge discrimina-

> tion and [w]age discrimination. Seems to me [that] they wanted to get rid of me . . . by demoting me to the floor, and[,] after several paycuts [] because I could not meet my SPH[,] fire me.'

"(Byrd Dep. Tr. at 45, Ex. 2 at 5.)

"In September 1999, Tiffany Winters applied for an AASM position at the Tuscaloosa store, and was hired a month later. Byrd testified that she heard Poole say that Winters was 'young and pretty,' and that he 'had to hire her.' (Byrd Dep. Tr. at 67, 70.)

"At the time Byrd left the company, she was only aware of poor sales as the Company's reason for eliminating the AASM position. She admitted having no evidence that the store manager knew at the time that the position would be reinstated later that year. Byrd testified that, despite the lack of evidence, she felt certain someone in the company knew her former position was not really eliminated because Winters was hired in that position so soon after she left.

". . . .

"Byrd filed her administrative charge with the Equal Employment Opportunity Commission ('EEOC') on February 24, 2000. In December 2000, Byrd and the other plaintiffs filed a complaint in federal court, alleging claims under the federal Age Discrimination in Employment Act ('ADEA') the Alabama Age Discrimination in Employment Act ('AADEA') and an Alabama fraud statute.

"Dillard's filed a motion for summary judgment as to the claims of Byrd and the other plaintiffs. The Company argued that Byrd's claim was time-barred because Byrd failed to file her EEOC charge within 180 days of any alleged act of discrimination. Dillard's argued that her state discrimination claim was also time-barred because the AADEA simply adopted the ADEA's limitations period. Alternatively, it

argued that Byrd had no direct or circumstantial evidence of age discrimination, which required judgment in its favor on the merits. With respect to Byrd's fraud claim, Dillard's argued in its motion that no evidence showed it made a false representation to her, but that only another store employee indicated that the AASM position was being permanently eliminated. Further, she did not actually rely on any such statements, that any reliance was unreasonable, that she had no evidence of an intent to deceive, and that she did not suffer cognizable damages.

"The district court granted the Company's motion for summary judgment as to all of Byrd's claims. It found that Byrd had reason to believe she had suffered age discrimination before the 180 days preceding her EEOC charge. Specifically, the district court found that her pre-resignation discussions with co-workers and her June 8, 1999, discovery of the reinstatement of the AASM position were sufficient to start the running of the statute of limitations. In addition, the court found that the AADEA's statute of limitations was, at most, 180 days because the language of the statute mirrored that of the ADEA. Thus, the court held that Byrd's AADEA claim was also time-barred. Finally, the district court found that there was no evidence the Company's allegedly false statement caused her any injury. Instead, the court found that Byrd resigned because she was being transferred to cosmetics and did not want to work in that department, not because of the elimination of the AASM position.

"The court also denied Byrd's motion to alter or amend its judgment. (Order dated June 25, 2002, at 3 (D. Ct. Doc. No. 31).)"

331 F.3d at 1261-63.

Byrd appealed to the Court of Appeals for the Eleventh Circuit. That Court reversed the district court's determination that Byrd's claim under the federal Age Discrimination in

Employment Act ("the ADEA") was time-barred. *Jones, supra.* Specifically, the Court of Appeals held that the 180-day limitations period for filing a charge with the Equal Employment Opportunity Commission ("the EEOC") was subject, under federal law, to "equitable tolling" because Byrd did not have sufficient knowledge of Dillard's alleged discriminatory action to file a claim within the 180-day time limit. Regarding Byrd's claim under the Alabama Age Discrimination in Employment Act ("the AADEA"), the Court stated:

> "On its face, the AADEA provides that it has the same statute of limitations as the ADEA. The ADEA, however, has two such limiting periods: 180 days and 90 days. Under the ADEA, a plaintiff has 180 days from the occurrence of the allegedly unlawful practice to file a charge of age discrimination with the EEOC. Once a plaintiff has received notice that the EEOC has dismissed the charge, she has 90 days to file her suit. 29 U.S.C. § 626(d)(1) and (e). Thus, the ADEA's statutes of limitations are intertwined with its administrative requirements.
>
> "Because of how the limitations operate in the ADEA, it is difficult, if not impossible, to transfer them to the AADEA."

Jones, 331 F.3d at 1269.

The AADEA provides, in part:

> "Any employment practice authorized by the federal Age Discrimination in Employment Act shall also be authorized by this article and the remedies, defenses, and statutes of limitations, under this article shall be the same as those authorized by the federal Age Discrimination in Employment Act except that a plaintiff shall not be required to pursue any administrative action or remedy prior to filing suit under this article."

Ala. Code 1975, § 25-1-29.

In construing any statute, it is the duty of this Court to ascertain and effectuate the Legislature's intent as expressed in the statute. *Water Works & Sewer Bd. of Selma v. Randolph*, 833 So. 2d 604, 607 (Ala. 2002); *Gholston v. State*, 620 So. 2d 719, 721 (Ala. 1993). The plain language of the AADEA reveals that the Legislature expressly adopted and incorporated the "statutes of limitations" applicable to claims brought under the ADEA. Ala. Code 1975, § 25-1-29. The use of the plural "statutes of limitations" should be given meaning.

Section 25-1-29 was drafted in face of two distinct deadlines in the ADEA, and it can be interpreted to give a logical field of operation to both deadlines. Specifically, the AADEA recognizes that an aggrieved person can file an action without being required to pursue an administrative remedy before filing the action. First, it failed to create an administrative agency to deal with claims made pursuant to the AADEA. Second, the AADEA expressly recognizes that an action may be filed in a state court before one is filed in the federal court. *See* § 25-1-29 ("However, if an action is brought in the federal court, any action pending in the state court shall be simultaneously dismissed with prejudice."). Presumably, the Legislature contemplated that a plaintiff might file a claim in a state court under the AADEA before a claim in the federal court is ripe, as to which the right to sue under the ADEA is suspended pending review of the claim by the EEOC. Third, the AADEA states that, "a plaintiff shall not be required to pursue any administrative action or remedy prior to filing suit under this article."

The express provisions in § 25-1-29, recognizing that exhaustion of an administrative remedy was not applicable in AADEA cases, coupled with the reference to "statutes of limitations," indicate that the Legislature intended that both the 180-day deadline and the 90-day deadline should be given a field of operation. Thus, we hold that the § 25-1-29

incorporates the statutes of limitations of the ADEA as follows":

(1) If a plaintiff files an AADEA claim in a state court within 180 days from the occurrence of the alleged unlawful practice, the applicable limitations period for filing a charge with the EEOC, then that plaintiff's claim is timely.

(2) If a plaintiff files a charge with the EEOC within 180 days from the occurrence of the alleged unlawful practice and thereafter receives notice that the EEOC has dismissed the charge, then that plaintiff's AADEA claim filed in the state court within 90 days after the EEOC's notice of dismissal of the charge is timely.

The implications of this construction on the case made the basis of the certified question are not before us.

QUESTION ANSWERED.

Houston, See, Lyons, Brown, Johnstone, Harwood, Woodall, and Stuart, JJ., concur.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Aug. 11, 2003]

No. 02-14145-CC

PAMELA SUE JONES,

Plaintiff,

versus

DILLARD'S, INC.,

Defendant.

SARAH CROCKER, LANA HOUSE, JAMES THOMPSON,
DEBORAH T. GIBBONS,

Plaintiffs,

GERDA BYRD,

Plaintiff-Appellant,

versus

DILLARD'S, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____ 11th Cir., 19__, ___ F.2d ___).

Before: DUBINA and FAY, *Circuit Judges*, and DOWD,* *District Judge*.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
United States Circuit Judge

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* Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jun. 25, 2004]

No. 02-14145-CC

PAMELA SUE JONES,

Plaintiff,

versus

DILLARD'S, INC.,

Defendant.

SARAH CROCKER, LANA HOUSE, JAMES THOMPSON,
DEBORAH T. GIBBONS,

Plaintiffs,

GERDA BYRD,

Plaintiff-Appellant,

versus

DILLARD'S, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____ 11th Cir., 19__, ___ F.2d ___).

Before: DUBINA and FAY, *Circuit Judges*, and DOWD,* *District Judge*.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

* Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Apr. 28, 2004]

No. 02-14145

District Court Docket Nos. 00-03646-CV-N-W
& 00-03647-CV-N-W

PAMELA SUE JONES,
Plaintiff,

versus

DILLARD'S, INC.,
Defendant.

SARAH CROCKER, LANA HOUSE, JAMES THOMPSON,
DEBORAH T. GIBBONS,
Plaintiffs,

GERDA BYRD,
Plaintiff-Appellant,

versus

DILLARD'S, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: April 28, 2004
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

No. ___ Supreme Court, U.S.
FILED
(2) 04-482 SEP 23 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DILLARD'S, INC.,
Petitioner,

v.

GERDA BYRD, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA,
WESTERN DIVISION

CV-00-N-3646-W, CV-00-N-3647-W

PAMELA SUE JONES,

Plaintiff,

VS.

DILLARD'S, INC.,

Defendant.

SARAH CROCKER, *ET AL*.,

Plaintiffs,

VS.

DILLARD'S, INC.,

Defendant.

May 30, 2002, Decided
May 31, 2002, Filed, Entered

MEMORANDUM

Judges: EDWIN NELSON, *United States District Judge*.

OPINIONBY: EDWIN NELSON

I. Introduction.

In August, 1998. defendant Dillard's, Inc., purchased a Gayfer's department store in Tuscaloosa, Alabama, from Mercantile Stores Company. Plaintiffs in this consolidated action are former Gayfer's employees who continued to work

for Dillard's after the buyout. All of the plaintiffs claim that Dillard's discriminated against them on the basis of their age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (2002) ("ADEA") and the Alabama Age Discrimination Act, Ala. Code §§ 25-1-20 to -29 (2001) ("AADA"). Plaintiff Gibbons asserts additional claims under Title VII for race, gender, and religious discrimination and retaliation. Plaintiff Byrd asserts an additional state law fraud claim. The court has both diversity and federal question subject matter jurisdiction over this action. Presently before the court is Dillard's motion for summary judgment against all the plaintiffs, filed April 1, 2002. [Doc. # 12.] The issues raised therein have been fully briefed by the parties and are now ripe for determination. Upon due consideration, the court finds that the defendant's motion is due to be granted.

II. Facts.[1]

A. The Sales-Per-Hour Program

While employed by Gayfer's, employees were provided with an annual wage increase regardless of their performance. Dillard's, on the hand, utilized an incentive-based pay program known as the Sales-Per-Hour ("SPH") Program that provided sales goals for employees. The SPH Program governed the pay of all sales associates except those who worked in the Men's and Women's Shoe Departments and in the Men's Suits Department; those sales associates were paid on a commission basis. Employee performance under the SPH Program was measured every six months.

---

[1] The facts set out below are gleaned from the parties' submission of facts claimed to be undisputed, their respective responses to those submissions, and the Court's own examination of the evidentiary record as to those alleged facts that either of the parties claim to be in dispute. These are the "facts" for summary judgment purposes only. They may not be the actual facts. *See Cox v. Administrator U.S. Steel & Carnegie Pension Fund*, 17 F.3d 1386, 1400 (11th Cir. 1994).

The SPH Program had "Standard Goals" and "Raise Goals" that were based upon an employee's hourly rate; the higher the employee's hourly wage, the higher the sales per hour goal. The SPH Standard Goal was the dollar volume of sales a sales associate was required to average for each hour worked on the sales floor to justify his or her pay. The SPH Raise Goal represented the dollar volume of sales that an associate should average on a per-hour basis during a review period to justify an increase in pay.[2] Dillard's made seasonal adjustments to the selling standards so that an employee had lower sales goals in a slow month, such as February, than in a busy month, such as December. The SPH Raise Goal was normally 10% higher than the SPH Standard Goal.

If a sales associate met his or her SPH Raise Goal for a given review period, the employee was entitled to a raise of at least twenty-five cents per hour. If a sales associate met his or

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[2] To determine the goals under the SPH Program, each Workcenter in the store was assigned a "selling cost." The selling cost for a Workcenter reflected the percentage of sales that Dillard's had determined should be the maximum amount allocated to payroll expense for that Workcenter. Selling cost calculations were based on nationwide historical sales data and were reviewed on an annual basis for possible modifications. If a Workcenter was assigned a selling cost of 10%, that means that Dillard's had determined that it should spend 10% of the dollars earned from its sales from that Workcenter on payroll costs for that Workcenter.

As an illustration, the selling cost for Children's Shoes was 14% and the Selling Cost for Housewares was 10%. The Children's Shoes Department had a higher assigned Selling Cost because it did not normally do as much volume in sales as the Housewares area. Under the SPH Program, to derive an employee's SPH Standard (i.e., the amount of sales the employee must make on an hourly basis to support his or her pay rate), an employee's hourly wage was divided by the selling cost percentage for the employee's Workcenter. If an employee made $10 per hour and worked in a Workcenter with a selling cost of 10%, then the employee's SPH Standard would be: $10 / 0.1 = $100 per hour. An employee's age did not factor into the sales goals derived under the SPH Program; it was purely a mathematical formula centered around a sales associate's hourly rate.

her SPH Standard, but did not meet the SPH Raise Goal, the employee remained at the same rate of pay. If a sales associate failed to meet the SPH Standard for a given review period, the employee's hourly rate would be reduced by 10%. If a sales associate received a pay increase or decrease, he or she was given new SPH Standard and Raise Goals for the next review period that were based on the employee's new rate of pay. If a sales associate continued to fail to meet SPH Standards, the employee's pay could be reduced downward to a rate that the employee's average SPH would support. If a sales associate failed to achieve the SPH minimum standards for a Workcenter, the employee could be discharged.

When Dillard's began operating the Tuscaloosa Store in August of 1998, the SPH Program was not immediately implemented, and employees were paid for approximately five months at the same rate they had been paid as Gayfer's employees. Beginning in January of 1999, Dillard's initiated the SPH Program at the Tuscaloosa store. During the first few months of the program's operation, Dillard's provided all sales associates with a "grace period" to become familiar with the program. During the grace period, sales associates were provided with raises if they achieved their SPH Raise Goals, but were not subject to a reduction in pay if they failed to meet their SPH Standard Goal.

B. The Plaintiffs

1. Sarah Crocker

Sarah Crocker, who was born on September 26, 1929, worked for Gayfer's as a sales associate prior to beginning work for Dillard's. She was paid an hourly wage of $9.65 the last day she worked for Gayfer's. Crocker continued to work as a sales associate in the area known as "Women's World" after the Dillard's buyout. Crocker's job duties included waiting on customers, putting out new merchandise, and keeping the department in order. Crocker worked part-time

for Dillard's, averaging approximately thirty hours per week. In November of 1998, after working for Dillard's for three months, Crocker was given a pay raise to $10.15 per hour. In February of 1999, Crocker was provided with an explanation of the SPH Program and was given an SPH Standard Goal of $ 169 and an SPH Raise Goal of $186. Crocker's SPH goals were seasonally adjusted for the period from February through April, 1999, to $171 and $188 respectively.

On May 27, 1999, Crocker received her first review under the SPH Program. For her initial review period, Crocker had actual sales-per-hour of $165, which was 3.5% below her SPH standard of $171. Crocker's wage was not affected during the May review, and she remained at the hourly wage of $10.15. Her SPH standard remained at $169, but her SPH raise goal was reduced to $177 for the period ending October 30, 1999. These goals were seasonally adjusted for the review period of May through October to $161 and $169, respectively.

On September 13, 1999, Crocker received a warning letter from her supervisor. The warning letter stated that during the first half of the review period to be completed on October 30, 1999, Crocker had an actual SPH of $137 compared with a mid-review SPH Standard Goal of $ 158, when adjusted for seasonal shifts in sales volume. The warning letter stated: "during the second one half of your review period, you must increase your sales performance enough to bring your actual SPH for the entire review period up to standard. If you do not do this, you will be subject to a 10% reduction in your rate, or termination if your support rate with a reduction is less than the work center minimum." Crocker Dep. at Ex. 10.

On November 1, 1999, Crocker submitted her notice of resignation in which she stated that she was retiring. In her resignation notice, Crocker wrote that her last day to work would be November 27, 1999. When Crocker made

the decision to resign, she knew her pay was going to be reduced on November 28. On November 17, 1999, Crocker was notified that her actual SPH for the period ending October 31, 1999, was $ 135, which was 16.1% below her SPH standard of $ 161. Crocker was advised in the notice that effective November 28, 1999, her hourly rate would be reduced from $10.15 to $9.15. When asked why she did not wait to see if things would improve after the first notice of a pay cut, Crocker stated "because I didn't want to do the same work I was doing for a dollar less an hour." Crocker Dep. at 128.

2. Deborah Gibbons

Deborah Gibbons worked as a sales associate in Housewares at the time of the buyout and continued to work in that position thereafter. Gibbons made $9.00 an hour while working for Gayfer's. Initially, she was paid $10.00 an hour when hired by Dillard's and later was given a raise to $10.50 per hour.

As a sales associate in Housewares, Gibbons' pay was governed by the SPH Program. She understood that her pay could be increased or decreased depending upon whether she exceeded or fell below the standards under the SPH program. On February 15, 1999, Gibbons was given an SPH Standard Goal of $105 and an SPH Raise Goal of $116. The goals were seasonally adjusted for the period to run from February through April to $106 and $117 respectively. On May 29, 1999, Gibbons received a report that showed she had an actual SPH of $42, which was approximately 40% of her SPH Standard Goal of $106. Her hourly pay of $10.50 per hour was not reduced though she had failed to achieve the SPH Standard Goal assigned to her. For the period to run from May 2, 1999, through October 30, 1999; Gibbons's SPH Standard remained at $105, but her SPH raise goal was reduced to $110 per hour. Gibbons spoke to store manager, Scott Gallant, on August 21, 1999, about the possibility of

moving into the linens area and she was allowed to move to that area.

In the Fall ~~Season~~ of 1999, Dillard's corporate management determined that there were too many sales associates in various Dillard's stores whose actual SPH figures were unacceptably low. Store managers were instructed to counsel any sales associates whose actual SPH was less than 70% of the average of the actual SPH achieved by the sales associates in their Workcenter. The requirement affected all Workcenters in all Dillard's stores. Sales associates were informed that they would be discharged if they did not increase their sales to a level so that their sales over the prior four to five month period were equal to or greater than 70% of the average SPH of Sales Associates in their Workcenter.

In September of 1999, Store Manager Scott Gallant advised Gibbons that if she did not bring her SPH up to the 70% figure by October 2, 1999, she would be discharged. Gibbons failed to improve her sales performance to 70% of the Workcenter average by October 2, 1999, and was discharged. Gibbons' last day to work for Dillard's was October 9, 1999. She was forty-seven years old at the time of her termination.

3. Lana House

House began working for Gayfer's in 1972. She was employed full-time for Gayfer's in its Children's Shoe Department from 1982 until the buyout. She and all other sales associates in the Children's Shoe Department were required to meet SPH requirements. House was warned that if she failed to meet her sales goals she could receive a reduction in pay and/or disciplinary action up to and including discharge. She was paid at an hourly rate of $13.75 per hour and provided with an SPH Standard Goal of $98 and an SPH Raise Goal of $108. On February 12, 1999, House received seasonally adjusted SPH requirements for the period from

February through April to provide for SPH Goals of $99 and $109 respectively.

On May 24, 1999, House received her first performance review under the SPH Program. She had an actual SPH of $107 per hour, which exceeded her SPH Standard Goal of $99 per hour. Her sales did not exceed her Raise Goal of $109, however, and her pay remained at $13.75 per hour. During that same review, House was given her new SPH Goals for the period from May 2, 1999, through October 30, 1999. Because her pay did not increase or decrease, her SPH Standard Goal remained at $99, but her Raise Goal was reduced to $103. Those goals were seasonably adjusted for the period of May through October, 1999, to $97 and $102 respectively.

On November 8, 1999, House was provided with her SPH performance review for the period ending October 30, 1999. House had an actual SPH of $55 versus her SPH Standard Goal of $97. Because she did not meet her SPH Standard Goal, she was notified by her supervisor that her pay rate would be reduced from $13.75 per hour to $12.40 per hour effective November 28, 1999. House was also provided with her SPH requirements for the period beginning October 31, 1999 and ending on April 29, 2000. Because her pay was reduced, her SPH Standard Goal was reduced to $ 89 and her SPH Raise Goal was reduced to $98. House was advised that her pay could be returned to $13.75 per hour if her average SPH met or exceeded her Raise Goal. She was advised that if she did not achieve at least 90% of her SPH Standard Goal during the review period, her pay could be reduced to $11.20 per hour.

On May 5, 2000, House was presented with a performance review for the period ending April 29, 2000. She had an actual SPH of $54 versus an SPH Standard of $89. Given House's failure to meet her SPH Standard, her pay was reduced from $12.40 per hour to $11.20 per hour effective

May 28, 2000. House's new SPH Standard was $ 93 and her Raise Goal was $102.The were seasonally adjusted to $92 and $101 respectively. On June 13, 2000, House submitted her notice of resignation, stating that her last day to work would be July 7, 2000. She decided to resign because she could not meet her sales goals and because of the associated stress. She was then fifty-four years of age.

4. James Thompson

Thompson began work for Gayfer's in 1979. At the time of the Dillard's buyout, he was working as a sales associate in the Housewares Department and was also doing general maintenance work for the store. Thompson made approximately $9-10 an hour at the time he worked for Gayfer's prior to the sale. He received a raise while working for Dillard's, and was making approximately $11 an hour at the time he was discharged. After beginning work for Dillard's, Thompson was allowed to choose between a full-time position as a sales associate in Housewares or a full-time position in shipping and receiving. Thompson chose the sales associate position.

In January of 1999, Thompson was given an SPH Standard Goal of $111 and an SPH Raise Goal of $122. On May 31, 1999, Thompson received his SPH performance review for the period ending May 1, 1999. He had an actual SPH of $38 per hour, which was less than 40% of his SPH Standard Goal. At that time, Thompson was given an SPH Standard Goal of $96 and a Raise Goal of $101 for the period ending October 30, 1999. (Thompson Depo., Ex. 7). Despite his failure to achieve his SPH Standard Goal for this initial review period, Thompson was not subjected to a pay cut or any disciplinary action and remained at $11 per hour.

In September of 1999, Thompson met with Store Manager Scott Gallant and Steven McCreless, Department Manager for Housewares and was notified that he had failed to meet 70%

of the SPH average achieved by associates in his Workcenter for the last seven months. The Workcenter average for Housewares was $87 per hour: 70% of that figure was $60.90 per hour; and Thompson had an actual SPH of $ 46 per hour. Thompson was told that he would be discharged if he did not improve his SPH to achieve 70% of the Workcenter average for the 7-month period by the close of business on Saturday, October 2, 1999. He failed to do so and, on October 9, 1999, was discharged. He was sixty-six years old at the time of his termination.

5. Pamela Jones

Pamela Jones, who was born December 3, 1953, began working for Gayfer's in 1975. At the time of the buyout, she worked as a sales associate in the Ladies Shoe Department She she continued in that position after the buyout. When Dillard's took over Gayfer's, Jones was making $12.45 an hour. Soon after the takeover in August of 1998, Jones was given a raise to $13 per hour.

As a sales associate in Ladies' Shoes, Jones was paid on a commission basis, earning a commission equal to 9.3% of the net sales that she made. Jones was provided with a weekly draw against her commissions. Under the draw system, Jones and other commissioned workers were advanced money each week for each hour they worked on the sales floor at a specified hourly rate. If the sales associate were to sell enough shoes so that her commission exceeded her draw, she was provided with a commission check in addition to the draw checks once a month. Jones initially received a draw equal to $13.00 for each hour she worked on the sales floor. Jones also did some non-sales work, such as stock or merchandising, and was paid an hourly rate for that work under the "special hours" classification.

On October 5, 1998, Jones was provided with a commission sales agreement which provided the terms of her pay.

Her commission sales agreement expressly provided for the actions that would be taken if a sales associate did not have enough sales to cover the draw that the employee had taken:

> When you do not have enough NET SALES to cover your DRAW, the COMMISSION actually becomes a negative number and creates a DEFICIT. This DEFICIT will be carried over month to month, and any COMMISSIONS earned will reduce the DEFICIT by a corresponding amount. Likewise, continued substandard performance will increase the DEFICIT total. When the DEFICIT is reduced to zero, the COMMISSION balance and/or future COMMISSION is paid. At no time will your DEFICIT condition be carried for more than an eight-month period in normal work centers . . .
>
> Whenever you have two [2] consecutive months with a DEFICIT condition, you will receive a documented warning that you are not earning your DRAW. If you continue to have a DEFICIT for three (3) consecutive months (total of ninety days in DEFICIT), your DRAW will be cut to a percentage of the amount supported by your NET SALES for the previous three month period, but in no case less than 1-1/2 times the minimum wage (see formula below). If you continue in deficit for six (6) consecutive months (total of 180 days in DEFICIT), your DRAW will be reduced to the commission minimum.

Jones Dep. at Ex. 8.

In the first months that Jones worked under her commission sales agreement, her sales exceeded her draw and she was paid additional commission checks. On July 9, 1999, Jones received a sixty-day warning letter stating that her draw had exceeded the commission she had earned on her sales for the past two months by $503.37. She was told in the letter that if she did not reduce her deficit during the current month then her draw would be reduced to help off-set the deficit. Jones acknowledges that her supervisors allowed her addi-

tional time on the floor to sell shoes to help increase the commission that she earned so as to off-set her deficit. On August 12, 1999, Jones received a ninety-day draw reduction letter noting that over the last three months, her draw had exceeded her commission earned by $759.40 and informing her that she would have a new reduced draw rate of $7.75 to help off-set the deficit.[3]

Jones completed an employment application with Regions Bank on September 15, 1999, approximately one month after receiving notice that her draw would be reduced. In her application, she stated her reason for wanting to leave Dillard's as being "need a change." Jones was offered a job with Regions Financial Corp. on September 15, 1999, and she accepted the offer. On September 23, 1999, Jones submitted her notice of resignation to Dillard's, stating that her last day of employment would be October 7, 1999. She was forty-five years old at the time she resigned.

Jones claims that Operations Manager Andy Poole, who was also a former Gayfer's employee, told her that "Dillard's would eventually get rid of people my age." Jones Dep. at 79. She also claims that Poole told her that "Dillard's would get rid of all the Gayfer's Mercantile people." Jones Dep. at 82. Poole never identified any particular person or persons in Dillard's management who he believed had expressed animus toward older employees. Jones Dep. at 83. During her deposition, she could not remember whether Poole told her of any facts upon which he based his belief that Dillard's might want to get rid of older workers. Jones does not remember

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[3] To calculate a reduced draw rate, Dillard's took the amount of sales that a sales associate actually had and divided it by the hours worked during that same time period. That figure is then multiplied by 0.8 to give the new draw rate unless the new draw rate was below the Workcenter minimum, in which case the new draw rate became the Workcenter minimum.

any members of Dillard's management making any derogatory remarks to her about her age.

6. Gerda Byrd

When Dillard's acquired the Tuscaloosa store in August, 1998, Gerda Byrd worked as the store Credit and Office Managers. Those positions did not exist in the Dillard's management scheme. Byrd was offered a choice of remaining in Customer Service, at a lower rate of pay, or taking a position as Assistant Area Sales Manager ("AASM") at the same pay she had received as Credit Manager and Office Manager, $600 per week. She chose the AASM position. Under Dillard's Associate Work Rules, Byrd and all other sales associates were employed on an "at will basis," and "both an associate and the Company have the right to terminate the employment relationship at any time, for any reason or no reason, as long as the termination does not violate Federal or State statutes." Crocker Dep. at Ex. 4.

The salaries of Assistant Area Sales Managers and Area Sales Managers were charged to the Sales Management Expense Account. Dillard's contends that in 1999, it requested the Tuscaloosa store and other stores to reduce the Sales Management Expense Account costs to a number less than 1% of the store's sales. Dillard's further alleges that the Tuscaloosa store payroll for Area Sales Managers and Assistant Area sales Managers exceeded 1% of sales, so District Manager Gary Wirth decided to eliminate the Assistant Area Sales Manager positions in the Tuscaloosa store.

Richard Lucas, who had worked as an AASM at the Tuscaloosa store, was moved into shipping and receiving. Byrd was offered a position selling cosmetics at the Clinique counter in the Tuscaloosa store. She declined the position in Cosmetics because she knew the position would eventually entail having to maintain an SPH goal, which she felt she

would be unable to meet because she had no experience in the Cosmetic Department. She asked Store Manager Scott Gallant and District Manager Gary Wirth for a severance package in late April or early May, 1999. Mr. Wirth arranged for a severance package for her, consisting of payments of $600 per week for 47 weeks, beginning after her last paycheck and continuing into 2000. She was fifty years old at the time of her resignation.

Gerda Byrd testified in her deposition that Andy Poole, Operations Manager for the Tuscaloosa Dillard's store, told her in June, 1999, that Scott Gallant (then Store Manager) had told him to look for two candidates for AASM within the store. In August, 1999, Area Sales Manager Linda Reynolds resigned from Dillard's to take other employment. Reynolds' salary had been charged against the Sales Management Expense Account, so, according to Dillard's, her departure permitted hiring an AASM. In September, 1999, Tiffany Winters applied to the Tuscaloosa Dillard's store seeking a position in sales management. Ms. Winters was hired in October, 1999, as an AASM. Byrd testified that after Winters was hired, Andy Poole told her that "when he saw Tiffany Winters walk in his office, he said she was young and pretty, and he just had to hire her." There were no AASMs in the Tuscaloosa Dillard's store from the time of Gerda Byrd's resignation in May, 1999, until Tiffany Winters' hiring in October, 1999.

III. Standard.

Under *Federal Rule of Civil Procedure 56(c)*, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The party asking for summary judgment "always bears the initial responsibility of informing the district court of the basis for

its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (quoting *Fed. R. Civ. P. 56(c)*). The movants can meet this burden by presenting evidence showing that there is no dispute of material fact, or by showing that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. *Celotex*, 477 U.S. at 322-23. Once the moving party has met his burden, *Rule 56(e)* "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions of file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting *Fed. R. Civ. P. 56(e)*).

After the plaintiff has properly responded to a proper motion for summary judgment, the court must grant the motion if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The substantive law will identify which facts are material and which are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. "The judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Id.* at 249 (citations omitted); *accord Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989). Nevertheless, credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are the function of the jury, and therefore the evidence of the non-movants is to be believed

and all justifiable inferences are to be drawn in his favor. *Anderson, 477 U.S. at 255*. The non-movant need not be given the benefit of every inference but only of every reasonable inference. *Brown v. City of Clewiston*, 848 F.2d 1534, 1540 n.12 (11th Cir. 1988).

IV. Discussion.

A. Introduction

In their complaint, the plaintiffs asserted a number of claims against Dillard's. Crocker alleged that Dillard's violated the ADEA by decreasing her pay, constructively discharging her, and maintaining a hostile work environment. She also alleged that Dillard's violated the *Alabama Age Discrimination Act*. House and Jones asserted the same four claims as Crocker. Thompson alleged that Dillard's violated the ADEA by terminating him and maintaining a hostile work environment, and that Dillard's violated the *Alabama Age Discrimination Act*. Gibbons alleged the same three claims as Thompson, and further alleged that Dillard's violated *Title VII of the Civil Rights Act of 1964* by discriminating against her on the basis of her race, gender, and religion, and by retaliating against her. Byrd alleged that Dillard's violated the ADEA by inducing her to resign and maintaining a hostile work environment. Byrd also alleged that Dillard's violated the *Alabama Age Discrimination Act* and committed fraud in the inducement. Finally, the plaintiffs included a catch-all count alleging discrimination by Dillard's against them and similarly situated individuals at the end of the complaint.

In its motion for summary judgment, Dillard's sought judgment as to each and every claim. In response, the only claims that the plaintiffs sought to protect from Dillard's motion were (1) Crocker's, House's, and Jones' pay reductions in violation of the ADEA; (2) Thompson's and Gibbons' terminations in violation of the ADEA; (3) Byrd's transfer in violation of the ADEA; and (4) all of the plaintiffs' state law

claims. Because they were silent as to their remaining claims, plaintiffs shall be deemed to have abandoned them.[4] The remaining claims are discussed below.

As an initial matter, the court notes that both parties seem to accept that the standards applicable to claims brought under the federal ADEA are applicable to claims brought under the *Alabama Age Discrimination Act*. *See* Ala. Code § 25-1-29 (2001). Indeed, the only court, either state or federal, to have addressed this issue in a reported opinion has held that identical standards apply under the ADEA and the AADA. *See Bonham v. Regions Mortgage, Inc.*, 129 F. Supp. 2d 1315, 1321 (M.D. Ala. 2001) (Thompson, J.) ("Because it is self-evident that the AADEA's purpose and prohibition are like the ADEA's, to promote employment of older persons based on their ability rather than age and to prohibit arbitrary age discrimination in employment, it follows that [the principles governing the order and allocation of proof in ADEA and Title VII cases] should govern in AADEA cases as well.") As both parties have followed this approach, the court will examine the plaintiffs' federal and state age discrimination claims in a parallel and identical fashion, with the exception of Byrd's claims, which the court finds should be resolved separately.

B. Claims of Crocker, House, Thompson, Gibbons, and Jones

"In proving an age discrimination claim, a plaintiff can establish a prima facie case of discrimination through either direct evidence of discrimination or a variation of the four-part test outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), for

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[4] The claims that plaintiffs have thus abandoned are all of their hostile environment claims, Crocker's and House's constructive discharge claims, Gibbons' Title VII claims, and their catch-all count appearing at the end of their complaint.

circumstantial evidence." *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1358 (11th Cir. 1999) (citing *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989)). Direct evidence is evidence that, "if believed, would prove the existence of a fact [in issue] without inference or presumption." *Carter v. Miami*, 870 F.2d 578, 581-82 (11th Cir. 1989). "'Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age' will constitute direct evidence of discrimination." *Damon, 196 F.3d at 1359* (quoting *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081-82 (11th Cir. 1990). Furthermore, "for statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision." *Trotter v. Board of Trustees of the Univ. of Ala.*, 91 F.3d 1449, 1453-54 (11th Cir. 1996). Should a plaintiff produce direct evidence that discrimination motivated the employment decision complained of, the defendant must prove that the same employment decision would have been made in the absence of the discriminatory motivation. *See id.*

Where there is no direct evidence of discrimination, a plaintiff is required to establish a presumption of discrimination by setting forth a prima facie case. *Chapman v. AI Transport*, 229 F.3d 1012, 1024 (11th Cir. 2000). One method of so doing is to show that he: "(1) was a member of the protected age group, (2) was subjected to adverse employment action, (3) was qualified to do the job, and (4) was replaced by or otherwise lost a position to a younger individual." *Id.* Upon such a showing, the burden shifts to the employer to set forth one or more nondiscriminatory explanations for the adverse employment action that it took in regard to the plaintiff. *Id.* This is a burden of production and not one of persuasion. *Id.* Should the employer be able to set forth such a reason, the inference of discrimination that was created by the prima facie case drops from the case and the burden returns to the plaintiff to show that the employer's proffered

explanation is merely a pretext for age discrimination. *Id.* In responding to a defendant's legitimate, non-discriminatory reason justifying its complained-of action,

> [a] plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute his business judgment for that of the employer. Provided that the proffered reason is one that might motivate a reasonable employer, *an employee must meet that reason head on and rebut it,* and the employee cannot succeed by simply quarreling with the wisdom of that reason.

Id. at 1030 (emphasis added).

In the present case, plaintiffs Crocker, House, Thompson, Gibbons, and Jones have attempted to prove their case through both direct and circumstantial evidence. As for direct evidence, they point to three statements allegedly made by members of Dillard's management. First, they submit the affidavit of Andy Poole, Dillard's Operations Manager at the Tuscaloosa store during the relevant time frame, in which Poole states that District Manager Gary Wirth told him that the "Dillard's profile" needed to change. Even though Wirth "did not expressly state what he meant by "Dillard's profile,'" Poole interpreted this statement to mean that Dillard's wished to hire younger employees. The actual statement that Wirth allegedly made to Poole is clearly not direct evidence because a fact finder would have to draw the inference that the undefined "Dillard's profile" would exclude older individuals. That Poole was forced to interpret the statement in order to give it any meaning illustrates the fact that the statement is, at best, circumstantial evidence and not direct evidence.

The plaintiffs also point to two statements that Poole himself allegedly made. First, he allegedly told Byrd that Tiffany Winters, the individual that he hired as an Assistant Area Sales Manager several months after Byrd's resignation, "was young and pretty" and that "he just had to hire her." This statement does not qualify as direct evidence because the

plaintiffs have pointed to no evidence that Poole was an actual decision-maker in regard to the employment decisions that effected them and of which they now complain. While it is true that there is evidence that Poole was involved in the hiring decision of Tiffany Winters, which bears directly on Byrd's prima facie case, the actual decision of which Byrd complains is not the hiring of Winters, but her own transfer and subsequent resignation. Winters' hiring, at best, serves as evidence of discrimination. It is not the act of discrimination itself.

The second statement of Poole's to which the plaintiffs point is the alleged remark that he made to Jones that "Dillard's would eventually get rid of people [her] age." Again, the plaintiffs have not pointed to any evidence that Poole himself was involved in any of the complained-of decisions at issue in this lawsuit. Moreover, the record is devoid of any basis upon which Poole rested this comment. Was it his feeling that Dillard's was trying to fire older employees? Was he in possession of actual facts backing up his belief? Did he base this belief on actual statements from an individual in a decision-making role? With these questions unanswered, the court refuses to find that Poole's statement to Jones constitutes direct evidence of a discriminatory motive that can be attributed to the relevant decision makers involved in the decisions of which the plaintiffs complain. [5]

As they have failed to put forward direct evidence of discrimination, plaintiffs Crocker, House, Thompson, Gibbons,

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[5] In like fashion, Poole's remark in his affidavit that based upon his dealings with members of Dillard's management, "it became apparent to [him] that Dillard's wanted to hire employees who were willing to work for lower wages than many of the longtime Gayfer's employees," does not qualify as direct evidence of discrimination. At most, the statement indicates only Poole's interpretation of undisclosed interactions with other managers at Dillard's, not direct evidence of a discriminatory motive harbored by the decision makers relevant to the present case.

and Jones must rely on the *McDonnell Douglas* burden-shifting framework. For the purpose of this motion, the court will assume that all five of these plaintiffs have established a prima facie case[6] and that the burden has shifted to Dillard's to produce a legitimate, non-discriminatory reason for taking the adverse actions that it did against them. As to Crocker and House, Dillard's argues that their pay was reduced because they failed to meet the goals set under the Sales-Per-Hour Program. As to Thompson and Gibbons, Dillard's argues that they were terminated for failure to achieve 70% of the average sales made by the sales associates in their respective work centers. As to Jones, Dillard's asserts that because her draw exceeded the commission that she was earning on her sales, her draw was reduced in order to help repay the over-ages against her draw. Dillard's asserts that the programs under which the above actions were taken dictate that an employee's salary is tied directly to his or her performance and does not take the employee's age into account, either facially or as applied.

Because Dillard's has offered legitimate, non-discriminatory reasons for its actions in terminating or reducing the salaries of the plaintiffs, the plaintiffs are required to present evidence that the reasons asserted by Dillard's are merely a pretext for age discrimination. Because Dillard's proffered reasons are ones that could motivate a reasonable employer, the plaintiffs are not allowed to simply quarrel with the wisdom of the reasons that Dillard's sest forth, but must meet those reasons "head on" and rebut them, either by showing

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[6] Indeed, Dillard's does not dispute that Crocker, Thomson, House, and Gibbons have set forth a prima facie case as to their remaining discrimination claims. The court agrees with Dillard's that Jones probably cannot show that an adverse employment decision in that it was her weekly draw that was reduced, rather than the commission that she made on her sales. The court will assume that she has met her burden, however, because it is convinced that her claim, like those of the other four, fails at the pretext stage of the burden-shifting analysis.

that Dillard's did not rely on the reasons it gave for taking the actions that it did, or by showing that a different reason motivated Dillard's actions. This the plaintiffs have utterly failed to do.

Plaintiffs first argue that their goals under the SPH Program were unrealistic, "particularly given the low customer turnout and change in inventory at the store following the Dillard's takeover." This argument does nothing more than quarrel with the wisdom of Dillard's SPH Program, and is not evidence that Dillard's did not rely on its aforementioned reasons for taking the complained-of actions. Plaintiffs argue that the SPH goals were heightened in the Tuscaloosa store, "suggesting that Dillard's meant to eliminate much of the longtime Gayfer's work staff at the Tuscaloosa store." However, the evidence relied upon by the plaintiffs, the testimony of Gene Heil, a Dillard's Vice-President, reveals the following:

> Q. There was another component of the SPH formula that I guess kind of led to the termination of two of the plaintiffs in this case, James Thompson and Deb Gibbons. Can you explain that 70 percent of work center average I believe is how y'all—
>
> A. I was not running the Tuscaloosa store at the time, so I can't specifically comment on their scenario. I can only comment on how I understood the 70 percent in this situation to work at that time.
>
> Q. Okay.
>
> A. On a global or as far as I knew, a global scale.
>
> Q. Okay.
>
> A. I am sorry.
>
> Q. Tell me how you thought it worked—
>
> A. Senior management decided in mid season, mid fall season of 1999, that based on business conditions we

> had too many associates in various work centers in various stores that were not selling up to a minimum of 70 percent of the work center's sales per hour average for that particular store. They believed and they instructed us to counsel these associates and tell them that they needed to get above 70 percent of the work center average in that store or face termination.
>
> * * *
>
> Q. And you said senior management kind of focused in on certain work centers and certain stores, it was not across the board?
>
> A. No, it was all work centers in all stores.

Heil Dep. at 64-67. The plaintiffs have failed to point to any evidence disputing Heil's account of the reasons behind the 70% requirement that led to Thompson's and Gibbons' dismissals and how that requirement worked.[7] While the plaintiffs have attempted to characterize the 70% requirement implemented by management as "an attempt to cut back on the number of sales associates in certain locations," the foregoing testimony clearly demonstrates that such was not the case.

The plaintiffs' foregoing arguments do not show that the SPH Program, or the commission program under which Jones' draw was reduced, were discriminatory on their face or as it was applied to them. Moreover, they have neither demonstrated that Dillard's did not rely on the reasons it set forth for having reduced their salaries or terminated their employment, or shown that a different reason more likely

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[7] In regard to Gibbons, the plaintiffs put forth the further argument that she in fact met the 70% goal, outlined above, during the two weeks prior to her termination. It is undisputed, however, that her overall average for the entire review period in question was below 70%, in spite of her performance over the last two weeks of that period, and that her termination was based on her deficient performance for the entire period. *See* Def.'s Stmt. of Facts at PP 108, 110, 113, 115, and Plaintiffs' Response thereto.

motivated Dillard's actions. As a result, they have failed to rebut Dillard's legitimate, non-discriminatory reasons and their claims fail as a matter of law.

C. Byrd's Claims

1. ADEA Claim

Before reaching the merits of her federal discrimination claim, Dillard's asserts that Byrd did not file her charge with the EEOC within the requisite time and her claim in this court is therefore barred. It is undisputed that Byrd resigned from Dillard's in May, 1999, but did not file a charge with the EEOC until February, 2000. The ADEA provides that "no civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed . . . within 180 days after the alleged unlawful practice occurred . . . ." 29 U.S.C. § 626(d)(1) (2001). This 180-day requirement is not jurisdictional; it operates like a statute of limitations. *See Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 660 (11th Cir. 1993). The Eleventh Circuit has clearly held, and both parties acknowledge, that the 180-day period begins to run when the plaintiff "suspects that he may have been discriminated against on account of his age and is also generally aware of his legal right to obtain redress for that wrong." *McClinton v. Alabama By-Products*, 743 F.2d 1483, 1487 (11th Cir. 1984).

When a defendant raises the 180 day limitations period, the plaintiff bears the burden of proving that the limitations period is subject to equitable tolling. *Ross*, 980 F.2d at 661. Instead of a direct tolling argument, Byrd argues that the time should not begin to run on her claim until October, 1999, the point at which she learned that Tiffany Winters, a younger individual, had been hired into the position of Assistant Area Sales Manager, because that was the first point at which she

suspected that she had been discriminated against on account of her age. The court disagrees.

Dillard's points out that Byrd testified in her deposition that only a few weeks after she resigned her employment, on or around June 8, 1999, Andy Poole, then the Operations Manager at the Tuscaloosa store, told her that he had been instructed by Scott Gallant, General Manager at the Tuscaloosa store, to look for two new Assistant Area Sales Managers. According to her, she immediately recognized that Dillard's had lied to her about the reason she was relieved of her duties as AASM and transferred to cosmetics (that the AASM positions were being done away with). Shortly after Poole informed her that he was instructed to look for new AASMs, Byrd wrote the following in a letter:

> On Tuesday 6-8-99 Mr. Andy Poole told me at Chillys [sic] Restaurant that Mr. Gallant told him, they had to find two new AASM's.
>
> This happens after I was told, the store could not afford any AASM's because they were not making their figures. Seems to me, I was lied to!!! As soon as I find out there are two new AASM' [sic] in place I will file a lawsuit against Dillards. This lawsuit will be for Age Discrimination, and Wage discrimination. Seems to me, they wanted to get rid of me, by demoting me to the floor, and after several paycuts, because I could not meet my SPH fire me.

Byrd Dep. at Ex. 2. Earlier in the letter, she recounted that she had been concerned after Dillard's purchased the Tuscaloosa store because a number of the individuals being discharged were older. Finally, in her deposition, she testified that while she was working at Dillard's, there was conversation among herself and the other workers that the older Dillard's employees were "getting the shaft" in regard to separation from the company. Byrd Dep. at 72.

The Eleventh Circuit has stated that "in order for equitable tolling to be justified . . . the facts must show that, in the period more than 180 days prior to filing their complaints with the EEOC, [the plaintiffs] had no reason to believe that they were victims of unlawful discrimination." *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 660 (11th Cir. 1993); *see Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1435 (11th Cir. 1998).[8] While the facts indicate that Dillard's *may* have misled her regarding the reason she was transferred to cosmetics, she plainly had reason to believe that Dillard's reason for transferring her were not true. Her deposition testimony regarding her pre-resignation discussions with other Dillard's employees and what she wrote shortly after allegedly learning that she had been deceived by Dillard's clearly demonstrate that prior to the 180-day period leading up to her EEOC charge, she had reason to believe, and actually did believe, that Dillard's had discriminated against her on the basis of her age in violation of the ADEA. Thus, her ADEA claim is barred. *See Barnes v. Hillhaven*

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[8] The court is aware of the Eleventh Circuit's holding in *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023 (11th Cir. 1994), in which the Court appeared to state that one is not in possession of sufficient facts to start the running of the 180-day period until he is aware of the age of the individual replacing him. A close reading of that case indicates, however, that when one is aware that he is being replaced by an individual outside of the protected class, he is certainly in possession of sufficient facts to begin the running of the 180-day period. The court did not hold that the converse of this statement is necessarily true. Moreover, the facts of *Sturniolo* are easily distinguishable from the present case, because in *Sturniolo*, the plaintiff "asserted that he believed [his manager]'s stated reasons for the termination and did not have cause to doubt these reasons until several months after his discharge when [the plaintiff] confirmed that [the defendant] hired a younger individual [into his former position]." *Id.* at 1025. In the present case, as the record demonstrates, Byrd clearly had cause to doubt the reasons given for her transfer to cosmetics within only a few weeks of her resignation, and long before the beginning of the 180-day period leading up to her filing of a charge with the EEOC.

Rehabilitation and Convalescent Center, 686 F. Supp. 311, 314 (N.D. Ga. 1988) (holding that running of 180-day period in which to file charge is not tolled until the plaintiff learns the age of his or her replacement).

2. *Alabama Age Discrimination Act* Claim

Dillard's argues that Byrd's age discrimination claim brought pursuant to state law is also barred by the running of the limitations period. *Alabama Code* § 25-1-29 provides:

> The . . . statutes of limitations, under this article shall be the same as those authorized by the federal Age Discrimination in Employment Act except that a plaintiff shall not be required to pursue any administrative action or remedy prior to filing suit under this article.

Ala. Code § 25-1-29 (2001). Dillard's points out that there are two time limits in the ADEA: an aggrieved individual must file a charge of discrimination with the EEOC within 180 days of the complained-of event and must file his or her complaint in federal court within 90 days of receiving his or her right to sue letter from the EEOC. It argues that because these are the only limitations periods present in the ADEA, the Alabama legislature clearly intended that parties filing suit under the AADA are subject to, at the longest, a 180-day statute of limitations. Dillard's asserts that because the ADEA's former two-year statute of limitations was repealed well before the Alabama legislature passed the AADA, the legislature clearly did not intend a two-year statute of limitations to apply to actions brought pursuant to the AADA

The plaintiffs respond that the limitations periods appearing in the ADEA are not statutes of limitations in the traditional sense but, instead, serve only as administrative deadlines. These deadlines are inapplicable, the plaintiffs argue, because the AADA clearly does not require aggrieved parties to take any administrative action prior to filing suit.

As the ADEA therefore does not provide to the AADA a statute of limitations, Alabama's general two-year statute of limitations for those torts not enumerated in Ala. Code § 6-2-38 applies to AADA actions.

The court agrees with Dillard's. When debating and passing the AADA, the Alabama Legislature was certainly in possession of the knowledge that the two-year statute of limitations that had formerly applied to the ADEA had been repealed by Congress and that the only limitations periods remaining in the ADEA were the 90-day deadline by which to file suit after receipt of a right to sue letter and the 180-day deadline by which to file a charge of discrimination with the EEOC. As noted in the previous section, case law has made clear that these deadlines are not jurisdictional but, instead, serve as a form of statute of limitations, complete with the power to entirely bar suit on an otherwise valid discrimination claim. The Legislature presumably knew that the courts had treated these deadlines as statutes of limitations when it chose to adopt the "statutes of limitations . . . authorized by the federal *Age Discrimination in Employment Act*" for the AADA. The clear import of Ala. Code § 25-1-29, then, is to adopt, at the longest, a 180-day statute of limitations for actions brought pursuant to the AADA As a result, for the reasons discussed above, Byrd's AADA claim is barred.

3. Fraud Claim

Byrd finally asserts a state law fraud in the inducement claim. The crux of this claim is that Dillard's misrepresented to Byrd that it was ending the position of Assistant Area Sales Manager and transferred her to a position that it knew she would not accept in order to induce her to resign her employment with Dillard's. Under Alabama law, the elements of fraudulent misrepresentation are: (1) a misrepresentation of a material fact; (2) made either innocently or willfully to deceive or recklessly without knowledge; (3) which under the circumstances was reasonably relied

upon by the plaintiff; and (4) which caused injury as a proximate consequence. Ala. Code § 6-5-101 (2001); *Brushwitz v. Ezell*, 757 So. 2d 423, 429 (Ala. 2000). Dillard's argues that its representation that it was eliminating the AASM positions in the Tuscaloosa store was true at the time it was made, and that the positions were not reestablished until money in the budget was freed up by the resignation of an Area Sales Manager, several months after Byrd resigned. It also argues that Byrd did not rely on its statement that it was eliminating her AASM position, that any reliance was unreasonable as a matter of law, and that she did not suffer any cognizable damages.

In *Boackle v. Bedwell Construction Co., Inc.*, 770 So. 2d 1076 (Ala. 2000), the Supreme Court of Alabama discussed the fourth element of fraud, that the alleged misrepresentation be the cause of the injury complained of by the plaintiff, and recited the definition of causation found in the Alabama Pattern Jury Instructions:

> "The proximate cause of an injury is that cause which in the natural and probable sequence of events, and without the intervention of any new or independent cause, produces the injury and *without which* such injury would not have occurred."

Boackle, 770 So. 2d at 1081 (quoting APJI 33.00) (emphasis in original). Noting the converse of the foregoing, the Court pointed out that one way to view the issue of causation in regard to fraud is by asking whether the plaintiff has put forth evidence that he or she would have incurred the complained-of injury if the defendant had told (what the plaintiff believes to be) the truth concerning the material fact. *Id.*

All of Dillard's other arguments aside, the court is of the opinion that there is simply no evidence that Dillard's allegedly false statement concerning why it was transferring Byrd to cosmetics caused her the injury of which she complains: the transfer itself or her subsequent resignation. The

fact of the matter is that if she was induced to resign by Dillard's, the inducement was her transfer to cosmetics, not anything Dillard's might have told her concerning why she was being transferred. In other words, Byrd has put forward absolutely no evidence that were she told what, in her mind, would have been the truth behind why she was being transferred to cosmetics, that Dillard's wanted to open up the AASM position for a younger individual, she would not have resigned her employment. On the contrary, the only evidence of record to which the parties have pointed the court is that the only reason Byrd resigned her employment was because she was going to be transferred to the cosmetics department. The act that caused her to resign is and must be distinguished from the allegedly fraudulent reason given therefor.

The cases that Byrd cites in support of her claim do not dictate a contrary result and are easily distinguishable from the present situation. In *Smith v. Reynolds Metals Co.*, 497 So. 2d 93 (Ala. 1986), a summer employee who was discharged after it was found that she was not qualified for the position into which she had been hired was allowed to maintain a fraud action against her employer because there was evidence that in reliance upon the employer's pre-employment determination that she was in fact qualified for the position, she had turned down other opportunities for employment and schooling for the summer. *Smith*, 497 So. 2d at 95-96. In *Ramsay Health Care, Inc. v. Follmer*, 560 So. 2d 746 (Ala. 1990), the Alabama Supreme Court held that a jury question on fraud was presented by the plaintiff when he put forward evidence that he left his former job and took a position with the defendant in reliance upon the fraudulent representations of the defendant that he would be entitled to termination benefits if and when his employment with the defendant came to an end. *Follmer*, 560 So. 2d at 749-52. In *Kidder v. AmSouth Bank, N.A.*, 639 So. 2d 1361 (Ala. 1994), the Court, answering a certified question from the Northern District of Alabama, held that a defendant employer can be

liable to a plaintiff for fraud if the plaintiff gave up her former employment and came came to work for the defendant based upon fraudulent promises made by the defendant concerning working conditions. *Kidder*, 639 So. 2d at 1361-63. Finally, in *Forbus v. Sears Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992), the Eleventh Circuit reversed a lower court's grant of summary judgment and held that a fraud action brought by employees who had voluntarily entered into retirement contracts should go to the jury when there was evidence that they had been told by the employer that it was preparing to eliminate a number of jobs, when in fact this was not true, and that the retirement contracts offered by the employer contained better benefits than those to which the employees would have been entitled had their employment been terminated. *Forbus, 958 F.2d at 1041-42.*

The common thread between all of the above-cited cases is the fact than in each of them, the plaintiff took or declined to take a particular action in reliance upon, and because of, the allegedly false statement of the employer. In other words, each plaintiff made a decision that he or she otherwise would not have made had he or she been told the truth by the employer rather than a lie. In the present case, there is no evidence that Byrd stepped down from her position as AASM because she was given a false reason for having to do so. She stepped down from that position because she was ordered to do so; there was no choice in the matter. The fact that she may have been given a less than accurate reason justifying Dillard's decision to transfer her to cosmetics does not create the causation necessary to sustain a cause of action for fraud. Further, the evidence indicates only one reason for her having decided to resign her employment: she did not want to work in cosmetics. There is absolutely no evidence that had she been told the truth as to why she was being transferred, she would have decided to remain at Dillard's in the cosmetics department. Because Byrd has pointed to no evidence that

sustains the fourth element of fraud, her claim fails and summary judgment is due to be granted in Dillard's favor.

V. CONCLUSION.

The court finds that the defendant's motion for summary judgment is due to be granted in its entirety. A separate order will be entered contemporaneously with this memorandum of opinion.

Done, this 30th of May, 2002.

Edwin Nelson
United States District Judge

ORDER

In accord with the Memorandum of Opinion, entered contemporaneously herewith, it is hereby ORDERED, ADJUDGED, and DECREED that the defendant's motion for summary judgment is GRANTED in its entirety with each party to bear its own costs.

Done, this 30th of May, 2002.

Edwin L. Nelson
United States District